

MPhil Thesis in Business Law  
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**Opening the window on Lex Mercatoria:  
From Medieval Times to the Future**

January 2017

## **ABSTRACT**

This thesis examines the application of the Lex Mercatoria (LM) as an applicable law in contemporary commercial practice in order to analyse the practicality and awareness of the global commercial law within arbitration. The crucial questions asked are how and to what extent the LM can be used in everyday legal practice during arbitral proceedings. The LM is acknowledged as a global commercial law and establishes its fundamental features in the global political economy, demonstrating the future direction of the global commercial law. The LM as a trade regulator has an essential role to manifest the differences in origin between global issues and local issues and has prompted a requirement for a legal framework of global issues. In order to assess the real picture of worldwide society, the role and significance of the LM is identified as legal and sociological dimensions. Reflecting that the nature of authority has changed within generations and with the enforcement of commercial norms, the LM is analysed in this thesis firstly within a historical context, mapping the evolution of the LM from medieval times to the present day and is followed with an analysis of trade in the society. To anticipate the future status of the LM is essential in order to locate and specify the structure and the nature of authority in the political economy.



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# Chapter 1: Introduction

The extraordinary range and depth of global interactions have intensified dramatically from production and financial transfers to the worldwide dissemination of information and communication. The term 'global' today is used to refer to the processes and to the results of globalisation. On one hand, the processes of globalisation are a multifaceted phenomenon with economic, social, political, cultural, religious and legal dimensions, which all interlink in a complex fashion. On the other hand, the processes of globalisation have recognised consequences. For example, the legal dimension of globalisation's result engenders new normative structures such as UNIDROIT Principles and the rise of new governance structures such as arbitration. It relates to a vast array of transformations across the globe for example the dramatic rise in inequality between the rich and poor, environmental disaster, global mass migration, global economic crisis and terrorism. Recent examples of the Syrian refugee crisis and the Greek economic crisis are striking and display the scope and effect of global integration and interaction and their effects on the rest of the world. The range and depth of global interactions have led us to view them as a rupture within the existing state-centric world system. Debates regarding globalisation have centred around these specific questions:

- Is globalisation a new or an old phenomenon?
- Is globalisation monolithic or does it have different meanings with different disciplines?
- Is it as important in the political, cultural, legal and environmental domains as it is in the economic domain?
- Is globalisation leading to a new structure of global governance in the concept of global society?

Globalisation appears to be gathering momentum. It has increased integration and interaction among all who breathe the atmosphere of our planet. Developments indicate that globalisation is a vast social field in which hegemonic social groups, interests and ideologies collide with counter-hegemonic ones on a global scale. As the twenty-first century has ushered in a new and globally integrated era, social relations and social structures are in a period of extended and deep-seated transformation on a global scale, which is referred to in this thesis as 'global political economy'.

The global political economy has four common denominators:

- The trend towards a global society
- The erosion and irrelevance of national boundaries in a truly global trade
- The relative decline of state power to influence or steer global economic developments
- The strong trend towards informal approaches to global rules and decision making.

## **1 Globalism versus Internationalism**

There is an obscurity between 'globalism' and 'internationalism'. It is very difficult to state where globalism starts and where internationalism ends. Once the obscurity between the two terms is made clear regarding terms of their scope and application, it will be clearer which one is applicable in order to overcome global problems. In some respects, the world is suffering from a deficit of globalisation, and a surfeit of internationalism.<sup>1</sup>

Although there is no clear-cut definition and that the two are intertwined, this thesis adopts that internationalism implies interaction between nation states whereas globalism denotes interaction beyond nation states and unmediated by states. For example; the powers of the United Nations (UN) are delegated by nation states so that only citizens' concerns are those that the nation state is prepared to discuss. What if a nation state is repressive, unaccountable

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<sup>1</sup> George Monbiot, *The Age of Consent: A Manifesto for a New World Order* (Flamingo, 2003).



or unrepresentative? The nation state acts as a barrier between us and the bodies charged with resolving the problems affecting us.

The power of globalisation bypasses governments and their usual political processes, to shape global futures directly by changing the decisions which govern the daily pattern of our lives. Internationalism alone appears to be an inadequate mechanism. Individuals who shares the same interests and stakes, whose class interests extend beyond the state, are left without influence over the way the global political economy develops. Individuals must harness the forces of globalisation and overthrow internationalist institutions by replacing them with their own. In doing so, the individuals will bring forward the era in which humankind ceases to be found by the irrational loyalties of nationhood. As a result, this thesis' argument is not to overthrow globalisation but to use it as a vehicle for humanity's first global democratic revolution.

A crucial task is to discover how the scope and application of globalisation and internationalism will be determined or what parameter should be taken and which one is applicable. This thesis employs the difference between local issues and global issues as a parameter for the applicability of globalisation and internationalism. According to the Global Risks Report 2016<sup>2</sup>, potential global issues and their interconnections are classified under five categories which are economic, environmental, geopolitical, societal and technological. In terms of the likelihood of global risks, these global issues are prominent: large scale involuntary migration, extreme weather events, failure of climate-change mitigation and adaptation, interstate conflict, unemployment and underemployment, data fraud and theft, water crisis and illicit trade.<sup>3</sup> The existence of the global society as a platform of global issues should not be kept away from the analysis of the difference of global and local issues. The global society forms a basis for global

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<sup>2</sup> See Appendix 3 and 4.

<sup>3</sup> Ibid.

issues through the range of globalising forces which are integrating the material, political, social and cultural life of so many individuals on the planet while disintegrating previously embedded forms of socio-economic and political mechanism that is 'internationalism'. This transformation involves a dialectical interplay between social forces. The global society is founded upon the global political economy that is historically specific yet a changing ensemble of social structures and social forces.<sup>4</sup> Social forces lead to the internal and external restructures and changes of the state and the global society in response to regulatory impacts of global issues. For example: the formal system of state sovereignty appears to have been cumulatively undermined by global trade which has a pervasive and deep-rooted economic integration and transformation. Through this transformation and integration social forces reflect a crisis of the existing world order and challenge hegemonic discourses in the study of political economy and international relations.<sup>5</sup> In order to respond to questions of how to regulate global issues, the configuration of an emerging world order is important and prerequisite.

## **2 Global Issues**

Globalisation creates a framework for the regulation of global issues that have cross-border implications such as the global trade, immigration, environmental and legal matters. The global political economy is bound up with the development of the global society which suggests a reconfiguration of the existing world order in the twenty-first century in order to regulate global issues. Issues which most concern us such as large scale involuntary migration, failure of climate-change mitigation adaptation and unemployment and underemployment can be addressed only globally. Without global measures and global institutions, and if left to the mechanism of internationalism global problems would be likely. An obvious example of this

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<sup>4</sup> Stephen Gill, *Gramsci, historical materialism and international relations* (Cambridge University Press 1993)

<sup>5</sup> *ibid.*

is environmental issues where an international system has not taken effective measures after a series of international meetings like the Kyoto Protocol in 1992, the 2009 Copenhagen conference and the 2015 United Nations Climate Change Conference.

The main argument this thesis will confront is the requirement of a global legal order. Differences in origin between global issues and local issues should be differentiated from each other in order to be regulated. To govern global and local issues under the same legal order is inadequate and unfair. Global issues have a different value system and are surrounded by particular circumstances that differs from local issues. The global issues should be conducted under a different legal order, which should not be measured against the circumstances of the local issues adopted by a state centric approach. This process is detached from domestic legal systems and escapes the realms of domestic lawmakers, which is limited to the territory of its respective jurisdiction. The features of the global issues can be explained by differentiation within the global society.

Lex Mercatoria (LM), the global commercial law, that regulates global trade is the most successful example of global law but it is not the only one. Various groups or classes within the global society and involved in particular global issues are developing a global law of their own. A similar combination of globalisation and informality can be found in another branches of law such as labour law, human rights and sport law. It is inevitable that the globalisation of law will follow as a spill-over effect of the mentioned developments. Therefore, within this context, globalisation means a shift of prominence in the primary principle of differentiation: a shift from territorial to functional differentiation.<sup>6</sup>

Some global issues have become a global problem with the support of (neo)liberal policies in the global political economy due to the lack of effective global measures and regulation. The

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<sup>6</sup> Gunther T, 'Global Bukowina: Legal Pluralism in the World Society' (1996) Dartmouth <[http://papers.ssrn.com/sol3/Fs.cfm?abstract\\_id=896478](http://papers.ssrn.com/sol3/Fs.cfm?abstract_id=896478)> accessed 8 August 2015, citing Niklas L, *Das Recht der Gesellschaft* (1993).

global society has faced a variety of crises: the financial meltdown of 2007-8, offshoring of wealth and power, the slow collapse of health and education systems, child poverty, the collapse of eco-systems and the refugee crisis. However, to blame globalisation for all these problems is futile. Nevertheless, the globalisation phenomenon breaks the legal framework of existing world order, namely internationalism, through global issues. In the global political economy, global issues have been regulated by various sectors of the global society through developing their own global law in relative insulation from the state. The main impetus behind the discrete regulation of global issues is that technical standardisation and professional self-regulation have formed tendencies toward world-wide coordination with minimal intervention of the international system. Therefore, what is needed for the global political economy is a conscious attempt to design a new global system, tailored to the demands of the 21<sup>st</sup> century.

### **3 The Lex Mercatoria and Arbitration**

An important question to ask is by which global hegemonic social forces and at what pace globalisation will continue? The dramatic economic transformations of the global society that have taken place and are taking place today at an enormous pace relate directly to the global political economy at the periphery of legal processes which serve as a laboratory for the creation of global legal structures.

Global trade is the prominent global issue in connection with global economic forces. As global economic integration and interdependency has increased immensely especially in the last two decades, the global society has become more open to global economic forces. This global economic integration has emphasized economic forces such as enhanced productivity, reduction of transaction costs and trade barriers, and the development from domestic and regional to a world market. Global economic forces that span national boundaries must then engender a body of commercial law which is global. In addition to the global economic forces,

(neo)liberal doctrine also highlights the global trade as an outstanding global issue through institutional separation of global society into an economic (private) and political (public) sphere. Juridification, pluralisation and privatization of the global commerce are crucial to recognize that state-society relations are being reconfigured by a “privatization of public power” and the creation of an entirely new ‘private’ realm, with a distinctive ‘public’ presence and oppression of its own: a unique structure of power and domination. Hence, privatized legal disciplines are increasingly finding their way into both international and national commercial legal orders; structuring domestic and foreign economic relations in ways that have a significant impact on state- society relations and on the political and economic relations between states. The complexity of the distinction between the public and private sphere in which the contested nature of the relationship between public and private trade law operate and the location of the LM within this legal framework contribute to a lack of understanding of the LM’s significance in the global political economy.

Therefore, this thesis should take into account both the social and legal analysis to evaluate the current climate for the globalisation of commercial law. This approach also clarifies that the existence and viability of the LM cannot be explained with a single factual or legal argument such as the proliferation of general contract conditions or the normative value of trade usages. In view of the dramatic changes of the global political economy, it requires a comprehensive perspective taking into account all aspects of global society. The logic of this movement towards one world is one law in those areas wherein uniformity is necessary and convenient. The global commercial law is the idea of the self-defence of the global society against the disintegrating and atomising thrust of global economic forces.

The development of global trade after the Second World War showed some of the flaws of the traditional regulation of commercial contracts. While global trade has developed, the needs for a universal commercial law can no longer be denied in order to avoid complexities and

diversities of national laws. The existence of a global business law has an increasing importance in the context of globalism as the integration of world economies and financial interdependency of national economies has been augmented. In this globalising world, a global commercial law plays an important role to provide a common language and business culture, which enables merchants, from diverse legal and political systems, to speak to one another and to transact in a relatively stable, fair, predictable and secure business environment. Thus, the LM meets the needs and requirements of the global political economy and functions to ensure a unity of purpose and coherence in regulation that is obscured by notions of pluralistic or a fragmented government.

The LM is produced at the ‘periphery’ of the legal process, not in the centre of the traditional sovereign or international law-making institutions but by way of a ‘self-reproducing legal discourse of global dimension at each industrial base’ in close interaction with globally operating industrial legal entities and transactions which are negotiated at the global level.<sup>7</sup> Otherwise, to capture the LM in tight meshes of legal positivism would be a grave mistake. The crucial question is simply whether a positive system of international law actually exists, or whether particular states and their representative legal scholars merely appeal to such positivist discourse to impose a particularistic language upon others as if it were a universally accepted legal discourse. The LM breaks a classical taboo, which is that law cannot exist and cannot be applied beyond the realms of domestic states and international relations. Hence, the LM’s a-national feature has a crucial role to correspond the needs of the global political economy and minimise the differences regarding legal thinking. Simultaneously, a global legal order has been emerging in this context of global commercial law, whose symptoms and evolving dynamics necessitate its existence. A crucial matter in this context is how structure

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<sup>7</sup> Klaus P B , ‘The New Law Merchant and the Global Market Place – A 21<sup>st</sup> Century View of Transnational Commercial Law’ (2001) < <http://www.trans-lex.org/2/print/>> accessed 17 November 2015

and nature of authority in the global political economy would be formulated within this emerging global legal order, bearing in mind that the generation and enforcement of global commercial norms is its determining factor.

The denationalisation of the legal process of global issues has been completed within arbitration in the global political economy. The arbitration mechanism serves as a natural jurisdiction of global economic transactions and strengthens the viability and existence of the global commercial law as a judicial power. One of the major reasons why arbitration has become a globally recognised dispute resolution mechanism in the global political economy is the recognition and enforcement of foreign arbitral awards assured in the most part of the world through the 1958 New York Convention as well as arbitration's tendencies to apply the LM. It is important to identify a role played by globalisation for consideration of roles of arbitration in determining and establishing the significance of the global commercial law. It represents a corresponding tendency for political systems to respond to this fusion of economic rationality with legal relations.<sup>8</sup>

#### **4 The Primary Concerns Confronted in This Thesis**

The piecemeal regulation of internationalism contrasted sharply with the increasingly universal character of the global trade. Like the feudal lords of medieval time, today's society realise that fragmented regulation of global trade through the application of independent national laws impedes the growth of global trade. In global society, international law has not recognized the significance and role of the LM, despite its continued adherence to the unification movement. This adherence is made more significant in the face of the realities of the global political economy because the growing significance of non-state authority and the erosion of the state

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<sup>8</sup> Luke Nottage, 'Practical and Theoretical Implications of the Lex Mercatoria for Japan: Central's Empirical Study on the Use of Transnational Law' (2000) 4(2) *Vindobona J Int Com Law and Arbt* <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=880388](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=880388)> accessed 10 December 2015

authority have been likened to a re-medievalization of the world.<sup>9</sup> This is also the reason why the Lex Mercatoria is the chosen term to keep that connection alive between the current and medieval LM especially in the light of the global business community's effort to develop the LM since the Medieval Time. In brief, what we are experiencing now is the re-emergence of the Medieval LM doctrine as a pragmatic response to the rapidly emerging global commercial law of the twenty-first century.

With the juridification, pluralisation and privatization of the legal commercial discipline, merchant autonomy has been enhanced within arbitration in order to resolve disputes outside court, or discard state authority within that legal process. As arbitration is an adjudicatory body of the global trade, 'applicable law clause' is an important element of the arbitration, which respects parties' choice and ensures the greater control over rules of decision for parties to arbitrate global commercial disputes. The reasons why the applicable law clause is a crucial factor for parties are:

- It is preferable that the applicable law agreed upon is adequately advanced in regard to specific issues likely to arise in any prospective dispute.
- Parties do not want to end up with an applicable law being applied by national law of another party.
- Parties may wish to exclude rules of conflict of laws causing complications and uncertainties as to applicable law.
- Arbitrators take into account rules and principles of the global commerce when reaching in to arbitral awards.

The applicable law clause is the one of the most popular clauses in the cross-border contracts to resolve any disputes that may arise in global commercial transactions. The prominent issue

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<sup>9</sup> A Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press 2003).



is what type of law is usually chosen in order to resolve disputes arising out of global commercial transactions. Parties negotiating global contracts would often feel the need to submit their agreement to neutral rules which do not favour either of parties. A traditional compromise solution consists in submitting the contract to the law of a third country - for instance Swiss law, English law or Swedish law. A significant percentage parties selected national laws as an applicable law to settle disputes that arise in the global trade. A crucial problem in this research is how justly national laws respond to the needs and the realities of the global political economy within arbitration. What if international parties do not specify an applicable law in their contracts? In fact, they do not correspond. By choosing a national law as an applicable law provides the extraterritorial application of a national commercial law that is not formulated needs and requirements of other party's homeland. The reality is akin to applying a 'one-size fits all' solution. This example simplified the main problem - the dilemma between global law (global issue) and national law (local issue). To consider both systems; national law and international law are the products of legal positivism taking national states in the centre of theories of law would not be an answer to regulate global issues like the global commerce. Therefore, the global commercial law plays a crucial role in creating an alternative neutral framework within arbitration in the global political economy. Determining the role of the LM is essential to the restructuring of the global political economy taking place through deeper transformations in local and global political and economic relations by forming juridical foundations.

The unification and universalisation of a law of commercial transactions and its separate adjudicatory mechanism necessitated some institutional changes in the global political economy especially with regard to economic and political alterations including the changing forms of state. To understand better the connection between processes of legal evolution and social differentiation, it is necessary to give up an idea that a legal system in its strict sense

exists only at the level of the nation state. This has an important impact on legal theories. The denationalisation of the global issues draws all attention to the relationship between global rule-making and legal theory, which is crucial for the future direction of the global commercial law and the structure of global authority.

A tension between the state-based existing system and the global political economy reveals the shift within the law. The state's loss of their formerly dominant position in global policy and rule-making with going along the decreased significance of its sovereignty and the freedom of parties in global contract law have caused a reconsideration of the traditional theory of legal sources. The traditional theory of legal sources is the force of the sovereignty state, meaning that only those rules adopt the quality of legal norms that have been vested by the sovereign state, the only source of the law. Since the law has to take account of complexities of the global society, a non-positivistic approach of the law has begun to emerge. This tension between the state-based existing system and global trade explains the tension within the law. Commercial norms are the outstanding part of the law, which leaves behind its state-based structure and adopts instead a structure of the global political economy.

The global commercial law would not only be problematic to the concept of state sovereignty but would also seek to articulate the global political economy and the accountability consistent with democratic control over global economic forces. The notion of global corporations remains problematic in the global political economy. The point of mentioning the global corporations demonstrates that subject of the law has to be defined again with being pursuant to the global political economy as international law is often irrelevant to global corporations' activities. In the global political economy, paradoxical exercises of public authority by non-state actors which are putative "objects" of the law remain invisible as legal "subjects". In the importance of defining "subjects of the law" of the global political economy, the dominant theories of international law and relations do not provide assurance of meaningful democratic

participation for individuals nor of the defence of their rights against non-state actors regarding to regulation of the global trade.

These efforts must show respect for differences, avoiding ethnocentric approaches and assists the development of global counter-hegemonic approaches. In order to thrive the global law paradigm for the global counter-hegemonic approaches, thought process must be de-familiarised with the existing world system, being challenged with changes and dynamics of the global political economy. These examples are simple ways of doing it: what we now generally take for granted has not always been present and this did not grow naturally in a predetermined way; what impact dominant discourses are having and how that in turn is being challenged; how a dissimilar way of thinking, when closely scrutinised, produces a different way of thinking that destabilising the received way. Accordingly, what is needed is the development of new approaches to the global political economy through the elaboration of historically integrated, dialectical forms of explanation, appropriate to the conditions of the twenty-first century.

#### **4.1 Objectives of This Research**

The prominent cause for why the role and significance of the LM has not been obtained is that global issues, the same as local issues, have been regulated by a national law based on traditional theories of law taking states in the centre of the answer for global disputes. Stated-based theory of law simply rejects the existence of legal norms and institutions outside the state. In terms of external stability and autonomy, states maintain their legal systems in a globalising world precisely through mutual recognition and collective allocation of regulatory powers among themselves. Hence, differences in origin between global issues and local issues prompt a requirement of a legal framework for global issues.

To regulate global issues within an exclusive legal framework, it is important to analyse enduring links between positive law, the LM and the global law paradigm, which were

established through the increasing juridification, pluralization and privatization of legal commercial disciplines. In exposing the inability of existing theories of law to account for the nature and scope of the private (economic) sphere, it is requisite to analyse and establish the role of the LM in seeking to design a new and unifying theory of global law paradigm. This issue is compounded by the need for a global authority structure that is essential for the global law paradigm.

Law cannot be isolated to the realities and requirements of the global society whose dynamics and values are based in the law. The global law paradigm is embodied in the global society and breaking off all the links between law and society made them disconnected and baseless because there would not be a global law without the global society. The logic of this movement towards one world is one law in those areas wherein uniformity is necessary and convenient.

A striking point in this context is at what stage the evolution of the global society is in at the beginning of the 21<sup>st</sup> century. In order to take and assess the real picture of the global society regarding the global commercial law, a sociological analysis is crucial and indispensable in order to evaluate accurately the global political economy. The role and significance of the LM has not been assessed accurately so far within broad perspectives in which legal and sociological perspectives are employed and prominent.

As a conclusion, it is worth researching to determine the existence and viability of the LM and adopting the LM as a global commercial order. If the global trade is compared with the game theory, existing circumstances belonging to the global trade without the LM would be very similar to playing a game without knowing the rules and framework of the game. Therefore, the global commercial law is foundational to the global political economy that the LM may be usefully regarded as both a constitutive element of the global business order and an attribute of the global legal order.

This research's main objectives are:

- To analyse the role of the LM within arbitration, evaluating it via sociological and legal angles in the context of globalization in order to determine the prospect and viability of it as a global commercial law.
- To examine the significance of the LM as integral to the restructuring of the global political economy taking place through deeper transformations in local and global political and economic relations by forming juridical foundations.
- To establish the role of the LM in the construction of a global law paradigm as a constitutive element of an emerging global order, especially in light of global authority structure, so as to provide a common language and fair business culture and to correspond to the needs of the realities of the global political economy.
- To demonstrate the requirements of a new and unifying theory of global law paradigm and emerging global order that influences theories of international relations and law that is capable of explaining the role of the LM as a global commercial law in the global political economy.
- To describe the importance of the status of non-state actors, especially global corporations, as they lack concrete presence in international law, despite serving as crucial participants in the creation and enforcement of global business law and seriously challenging the state's monopoly over legislative and judiciary powers in global commerce.

## **5 Methodology**

In order to reach a true and complete conclusion for the existence and viability of the global commercial law, considering a sociological and legal analysis of the global political economy is important to examine the role and significance of the LM. The role and significance of the

global commercial law can be established through a prism analysing in all perspectives and aspects of the global society. In addition, discussions regarding the existence and viability of the LM within arbitration have a basic deficiency that are largely based on assumptions, which have no empirical basis. Owing to the confidentiality of the arbitration processes through which published sources of data on the arbitration are limited, the discussions on the LM is thus characterized by so many misunderstandings and irreconcilable viewpoints. Hence, the debates on the LM have been trapped in a vicious circle because the analysis of the LM requires an empirical evaluation of the reality of the global commerce. The empirical evaluation is not just for practical usefulness but also for the theoretical viability. The theoretical viability must be supported by empirical evidence rather than postulating a phenomenon that fits into their theories. Empirical studies also challenge individual expectations and perceptions, signalling a transition from anecdotal to empirical knowledge as some of the most hotly debated issues in arbitration do not represent the most divergent views. This is perhaps a sign that the arbitral community is concerned about further extensive macro regulation but would welcome limited corrective micro regulation.<sup>10</sup> Therefore, an adequate theory of the LM cannot only rely on theoretical possibilities but also on empirical findings. This research benefits from the available up to date empirical studies to demonstrate the existence and viability of the LM within the arbitration in order to provide the empirical adequacy. Being aware of that no empirical research into methodology is complete without an exploration of the research methods, this research will benefit from both quantitative and qualitative research methods when selecting the best method among available sources serving better for the objectives of this thesis in each

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<sup>10</sup> The School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London and White & Case LLP, 'The International Arbitration Survey on Improvements and Innovations in International Arbitration' (2015) < <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> > accessed 14 December 2015

respect. However, the major concern with available sources in legal doctrine have never tested the global commercial law in theoretical connection with the global law paradigm.

The arbitration mechanism is the main platform providing empirical evidence on the role and practicability of the global commercial law. In terms of the empirical adequacy, this research categorizes sources: published and unpublished sources. There are two main parameters to examine the published sources, which are institutional arbitration rules and arbitration awards. First of all, institutional arbitration's approach to the global commercial law is the cornerstone in this research as parties submitting their disputes to institutional arbitration indicate shifting decision-making power from arbitrator to institutions because arbitration institutions' critical position in the discussions of the viability of the global commercial law is a living space for the LM. Arbitration rules are important indicating how each arbitration institution formulates their rules in regard to administer trade usage and general principles of the global trade as being sources of the LM. Arbitration awards are the most important and direct source to capture the use of the global commercial law at arbitration proceedings. But, arbitration awards are not publicly available due to confidentiality. The confidentiality simply means the public is excluded from the arbitration proceedings and could not access any details of the arbitration cases because arbitration awards are not published and publicly available. The confidentiality of arbitration awards impedes the development of the LM and affects the predictability of arbitration awards. In order to ensure a uniform and consistent interpretation of custom and practice, arbitration institutions have an important role to render *stare decisis* in arbitrations awards through informing the respected stakeholders. Due to strict use of the confidentiality, it is a drawback that no mechanism exists among arbitration institutions to ensure consistency of arbitral awards. Hence, only a small, non-random sample of arbitration awards are published

in heavily redacted forms.<sup>11</sup> Therefore, there are limited sources of arbitration awards to examine existence and viability of the global commercial law as an applicable law at arbitration proceedings. The International Chamber of Commerce (ICC) is the vital institutional arbitration to the methodology as ICC's inclination to the LM is seen in situations where its arbitrators had felt least constrained to apply national laws. The ICC published a 110 arbitral awards including interim and partial awards from 1983 to 2002, fifteen of whose awards applied the global commercial law in making the awards.<sup>12</sup> However, published awards of the ICC are not representative of all ICC awards so that extrapolating from published awards to all ICC awards is inappropriate. Moreover, the ICC's approach and effort to uniform and harmonized the rules of the global trade is definite and favourable which affirms ideology of the global commercial law. For example: Uniform Customs and Practice for Documentary Credits, Incoterms and Task Force on jurisdiction are applicable examining when and how to use LM in contractual relationships.

As for the unpublished sources, participants in arbitration proceedings are an important source – the parties, their representatives and arbitrators. Surveying the participants is a crucial method to gather information on the use of the LM within the arbitration. Only four enquiries have been made to verify the use of the LM in global practice. These enquiries are Selden Enquiry, Unidroit Enquiry, Gordon Enquiry and Central Enquiry.<sup>13</sup> The Central Enquiry is the foremost in this research as it is the latest enquiry and provides more reliable empirical data on the usage of LM in contract drafting and arbitration. The Central Enquiry's primary goal is to provide interested academics and practitioners for the first time with reliable data as to the application

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<sup>11</sup> Bernardo M Cremades and Steven L Plehn, 'The New Lex Mercatoria and The Harmonization of The Laws of International Commercial Transactions' (1984) 2(3) The Boston University International Law Journal < [http://heinonline.org/HOL/Page?handle=hein.journals/builj2&div=24&g\\_sent=1&collection=journals#](http://heinonline.org/HOL/Page?handle=hein.journals/builj2&div=24&g_sent=1&collection=journals#)> accessed 7 January 2016.

<sup>12</sup> Drahozal R C and Naimark W R, *Towards a Science of International Arbitration* (Kluwer Law International 2005).

<sup>13</sup> These surveys will be analysed in the chapter 3 under the title of 'The Existed Surveys on the Use of the LM in Legal Practice'.



of global commercial law in legal practices.<sup>14</sup> It has to be noted that the book called “Towards a Science of International Arbitration: Collected Empirical Research”<sup>15</sup> is an outstanding source providing empirical information of the Central Enquiry and other aspects of the arbitration mechanism, which this research utilizes. The Central Enquiry examined a broad number of the participants from 51 different countries with a response rate of 23.4%.<sup>16</sup> Nonetheless, the Central enquiry does not intend to be representative as reaching such a goal with a worldwide enquiry is almost impossible given the cost and time restraints.<sup>17</sup>

There are some limitations, arising from the definition and concept of the LM, that should be kept in mind when analysing the published and unpublished sources on the role and practicability of the global commercial law especially for the examining empirical evidences of the Central enquiry. The Central survey acknowledges LM as a third legal system known as ‘private international law’ between domestic law (first legal system) and public international law (Second legal system). The third legal system is an independent, supranational, apolitical and autonomous legal system and is satisfying all elements of traditional theory of international law as opposed to the concept of the global commercial law accepted by this research.

This research also takes into consideration three surveys which analyse the true features of arbitration,

- *Advantages of Arbitration on Arbitration and Settlement in International Business Disputes by Christian Buhring-Uhle*<sup>18</sup>
- *Expectations and Perceptions of Attorneys and Business People on International Private Commercial Arbitration by Richard W. Naimark and Stephanie E. Keer*<sup>19</sup>

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<sup>14</sup> Drahozal and Naimark (n 12).

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Drahozal R C and Naimark W R, *Towards a Science of International Arbitration* (Kluwer Law International 2005).

<sup>19</sup> Ibid.

- *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*<sup>20</sup>

In order to take account of the sociological perspective of the global political economy for the analysis of the role and significance of the global commercial law, historical materialism (HM) is the chosen theoretical approach and provides the elaboration of historically integrated, dialectical forms of explanation, appropriate to the conditions of the twenty-first century. HM is a “philosophy of praxis” and recognizes the revolutionary potential for a law by reunifying of legal theory and practice in emancipatory praxis as history articulates and mediates our thinking and doing through praxis. The philosophy of praxis is the self-enlightenment of human reality in order to examine active positions of humans to each other and to nature. The Gramscian understanding of the HM is outstanding for accounts of the global political economy, emerging on aspects: the global society, the global view of social hegemony and supremacy and global class, bloc formations and economic forces. The Gramscian approach challenges epistemological, ontological and ideological foundations of past, present and future through material capabilities, ideas and institutions. Gramsci’s historical materialist epistemology transcends rigid theories of causality and explains the reflexive and dynamic form of the global political economy. The philosophy of praxis that is concerned with explanation is inconsistent with the concept of the mechanical causality.<sup>21</sup> Taking into consideration the ontological aspects of historical materialism avoids a lapse into arguments concerning the determinacy of either politics or economics as consequence of the causality trap. Explanation is in this sense meant by the centrality of the interrelationship between social

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<sup>20</sup> The School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London and White & Case LLP, ‘The International Arbitration Survey on Improvements and Innovations in International Arbitration’ (2015) < <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> > accessed 14 December 2015.

<sup>21</sup> Stephen Gill, *Gramsci, historical materialism and international relations* (Cambridge University Press 1993).

forces in historical development. Hence, this entails the rejection of any model of reductionism such as economic or technological.

Therefore, the Gramscian approach brings forth a new elixir bringing out necessities of the emerging global order in order to meet with requirements of the global political economy. In this discussion, Gramscian historical materialism analyses the global political economy from the bottom upwards, as well as from the top downwards with regard to the emerging global order. This thesis will utilise two methods (the bottom upwards and the top downwards) to examine the essentiality of a global order in Chapter 4 and 5 consecutively.

Yet, this research will not rely on primary sources alone. It will engage with secondary sources which are recognized as the seminal texts in this specific area of study. To name a few, these sources include: Professor A. Claire Cutler, Professor Gunther Teubner, Professor Klaus Peter Berger and Professor Robert W Cox.

Finally, it will engage in a comprehensive literature review of secondary sources including but not limited to the aforementioned secondary sources.

## **6 Outline of the Thesis**

Following this introductory chapter this thesis will develop arguments successively in each chapter as mentioned below to establish the role and significance of the LM in the global political economy in order to determine the prospect and viability of the global commercial law.

**Chapter 2** demonstrates fundamental characteristics of the global commercial law i.e. definition, concept, functions and sources essential for the restructure of the LM. Knowing that the LM's definition and concept has frequently changed since Medieval times, it is essential and crucial to determine and clarify the foundations of the global commercial law.

**Chapter 3** examines the application of the LM as an applicable law in contemporary commercial practice in order to analyse the practicality and awareness of the global commercial law within arbitration. However, the arbitration mechanism will be scrutinized first because the arbitration mechanism serves as a natural jurisdiction of the LM and strengthens the viability and existence of the global commercial law as a judicial power. It is valuable to determine the significance and viability of the actual resort to the LM and to evaluate the stakeholders' approaches to the LM as an applicable law in contemporary commercial practice, supported by empirical evidence. Additionally, the denationalisation of the legal process of global issues has been observed within arbitration especially in global trade.

**Chapter 4** reviews the LM's journey from Medieval times through to the present day and on to the future in order to understand why the LM has not adapted with the globalization of legal practices. This historical evolution clarifies in a historic, economic and philosophical context from the medieval term to the global political economy. Through juridification, pluralization and privatization of the legal commercial discipline, significant structural changes in the existing world order lead to some fundamental changes in the global society, which requires a new world order to regulate the global trade as well as other global issues.

**Chapter 5** analyses globalising social forces in the leadership of global economic force integrating the material, political, social and cultural life of many individuals on the planet in the global political economy in regard to regulate global issues. The analysis of the interrelationships of the social forces is essential and indispensable to establish the role and significance of the global commercial law in the structure of the new global order. As the global trade, platform for the global economic force, is a model and outstanding global issue, the global commercial law plays a vital role because identifying the future direction of global economic force is a prominent component to determine a new global order through which a global authority structure should be established by the structure of global forces.

**Chapter 6** argues that the global commercial law is so fundamental to the global political economy, which may be regarded as both a constitutive element of the global legal paradigm and an attribute of the global order. To anticipate the future status of the LM especially in relation to global authority is essential for restructuring the global political economy because the nature of authority has changed within generations and with the enforcement of global commercial norms. Therefore, locating and specifying the structure and the nature of authority in the global political economy is linked to the LM.

## **Chapter 2**

This chapter presents the *lex mercatoria* (LM) as a global commercial law and establishes its fundamental features in order to be analysed. Knowing that the LM's definition and concept has frequently changed since Medieval Times, it is essential to clarify and demonstrate the foundations of the LM. Regarding the terminology used to describe the LM, there is no preferred or accepted term that establishes its role and significance. Therefore, to determine and consolidate the LM's structure in a definition and in a concept plays a key role in the future direction of the global commercial law. In this chapter, the LM is briefly evaluated in an approach that consists of legal and sociological analysis, one of the main attributes employed in this research. In addition, in order to regulate global issues, this chapter advocates the requirement of global legal order to fulfil the needs and realities of global political economy like global commerce.

### **1 Definition**

A settled definition of the LM which the majority of the doctrine agrees upon has failed to materialise. There are as many potential definitions of the LM as there are authors who have grappled with the matter. Potential definitions include private international law, new law merchant, general principles of international commerce and transnational business law. Each definition has its own value system, concept and understanding leading to factual and conceptual ambiguities. An agreed definition of the LM is crucial to decide its core elements, concept and characteristics as well as to establish the future direction of the LM. Moreover, a definition of the LM associated with the phenomenon of globalisation is becoming more significant in order to provide a common language and business culture and to trade in a predictable, fair and secure climate.

In this thesis LM is defined as:

*Lex Mercatoria is a global commercial law of economic transactions based on a-national principles of global political economy.*

## **2 Concept**

Terminology plays a major role in the discussion of rejecting or accepting the LM concept. In legal doctrine, the different terminologies used to refer to the LM are international law, transnational law, law merchant and common principles of law. These complex terminologies lead to complications of the concept of the LM as well as its definition, even though the writers' wording on the LM's concept is the same. Many professionals grasp the term "lex mercatoria" to be overloaded with theoretical and practical difficulties – being an uncertain and unpredictable system. Since Medieval Times, the concept of the LM has changed depending on each historic bloc.<sup>1</sup> Therefore, the term "lex mercatoria" should be relinquished in favour of the wider definition "global commercial law" in this thesis, remaining aware of the difficulties with new legal concepts especially in practice likely to open doors to an appeal for nullity of award.

The phenomenon of globalisation<sup>2</sup>, and how globalisation influences the pattern of evolving governing arrangements particularly considered the development of international and regional bodies consolidated with a broad range of regulatory powers, has shown now an emergence of new institutional configurations. Arbitration is one of those institutions and a general dispute resolution mechanism for disputes arising out of global trade operations. An internalisation of

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<sup>1</sup> Evolution of the LM's concept will be analysed at each historic bloc in order to disclose historical evaluation of the LM in Chapter 4.

<sup>2</sup> Phenomenon of globalisation is taken by this research as a term with substantive content rather than an abstract term like cliché.

the commercial arbitration mechanism has emerged by its organisation and functions as a non-attachment to a state, autonomy of arbitration clause, priority of procedural rules, freedom of choice of law including applications of an a-national law. The existence of a global commercial law would be meaningless without an arbitration mechanism. To understand the significance of the LM concept, commercial arbitration mechanisms in the globalisation phenomenon are fundamental for the evaluation of the global commercial law.

Since 1958, arbitration is a globally recognised dispute resolution mechanism of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award. Countries who have adopted the New York Convention have agreed to recognise and enforce international arbitration awards. As of January 2015, 154 state parties have endorsed the New York Convention from every geographical region and major legal, social and economic system. Recognising the growing significance of arbitration as a means of resolving cross-border commercial disputes, the Convention provides common legislative norms for the recognition of arbitration agreements and enforcement of non-domestic arbitral awards. The Convention's primary goal is that foreign arbitral awards will not be discriminated against domestic awards. It renders parties to ensure that such awards are recognised and enforced in respective jurisdiction in the same way as domestic awards. A secondary goal of the Convention is to oblige courts of parties to give full effect to arbitration agreements and awards, and to refuse the parties access to national courts in breach of their agreement. Hence, the New York Convention is the judicial constitution of dispute resolution mechanism for global trade.

In today's global political economy, the majority of global economic contracts contain an arbitration clause. According to Klaus Peter Berger, about ninety percent of global economic contracts, which differ on different types of global contracts, have an arbitration clause, and



according to officials of the Netherlands Arbitration Institute, more than eighty percent of global contracts contain an arbitration clause providing that disputes will be decided by arbitration.<sup>3</sup> Parties choose arbitration as a mechanism of dispute resolution rather than court litigation, where the arbitration mechanism is detached from domestic legal systems and is distanced from traditional theories of international law. Even, for investment treaty arbitration, sovereign states have assented to a global system in which investors are granted the power to make and enforce claims against states in disputes arising from the state's public capacity. The key feature of the investment treaty arbitration is that investors are permitted to make claims against the state without exhausting local solutions. Thus, the arbitration mechanism serves as a natural jurisdiction of global commercial arbitration and strengthens the viability and existence of the global commercial law as a judicial power.<sup>4</sup>

The LM is a law that adapts according to the essentialness of global economic activities and organisations. The LM's concept is an autonomous and independent global commercial law based on a-national nature. The LM has autonomous and independent character away from traditional international theories and referred to or elaborates the foundations of global commerce without reference to a national system of law. Power and growth of commercial arbitration are the most important factors for an autonomous global commercial law. Arbitral tribunals provide an "external control mechanism" for the validation of commercial relations which are decided upon contracts.<sup>5</sup> These tribunals are also an internal product of the contracts themselves due to the consensual character of arbitration.

In Schmitthoff's introductory speech to the London Colloquium in 1962, he stated:

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<sup>3</sup>Christopher R Drahozal and Richard W. Naimark (ed), *Towards a Science of International Arbitration* (Kluwer Law International 2005) 59.

<sup>4</sup> Judicial power is one of three main powers on the principle of separation of power founded by Montesquieu, which is accepted by legal positivism.

<sup>5</sup> Peter K Berger, 'The New Law Merchant and the Global Market Place – A 21<sup>st</sup> Century View of Transnational Commercial Law' (2001) < <http://www.trans-lex.org/2/print/>> accessed 17 November 2015

*The evolution of an autonomous law of [global] trade, founded on universally accepted standards of business conduct, would be one of the most important developments of legal science in our time. It would constitute a common platform for commercial lawyers from all countries, those of planned and free market economy, those from civil law and common law, and those of fully developed and developing economy, which would enable them to co-operate in the perfection of the legal mechanism of [global] trade.*<sup>6</sup>

### **3 An Analysis of the LM as Global Commercial Law**

In this thesis legal and sociological approaches are employed to explain the value of the LM concept in the global political economy. The research would be incomplete without either of these approaches. There are both sociological factors and legal developments, which must be taken into consideration to assess the current environment for the global commercial law. The existence of the LM as global commercial law cannot be elucidated with a single factual or legal discourse such as proliferation of the use of arbitration or increased normative value of global commercial contracts. Considering the realities of the global political economy, viability of the LM concept requires a comprehensive view, taking into account all aspects of global society. Therefore, the LM is a subject for legal and sociological analysis.

#### **3.1 Legal Analysis**

A series of legal developments have prompted a change in legal thinking about the LM within the framework of global society and the relationship between domestic law and global commercial transactions of the 21<sup>st</sup> century. Prominent legal developments showing evidence of where the LM is heading and the momentum behind it are:

- The victory of party autonomy

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<sup>6</sup> Peter K Berger, *The Creeping Codification of the New Lex Mercatoria* (2<sup>nd</sup> edn, Kluwer Law International BV 2010) 4.

- The realisation of that characteristics of domestic legal rules do not suit global trade
- The increased importance of non-state agents
- The progress of international treaties and uniform instruments like the Convention of International Sale of Goods (CISG)
- The complexity of private international law
- The increasing emphasis on general principles of law in contracts of global trade
- The recognition of comparative law as a base of universal law
- The progressive association of civil and common law
- Global codification of fields such as the regulation of joint ventures and the extraterritorial application of tax
- The success of arbitration in global trade

In light of these legal developments, three main features have emerged in the 21<sup>st</sup> century view of the global commercial law in order to establish the LM's role and significance.

### 3.1.1 Disjunction between Commercial Practice and Theory

The needs of global society are not matched by traditional theories of law because there is a substantial gap between commercial practice and theory. The traditional theories of law are centred on the notion of state sovereignty. It means only those rules imposed by nation states are adopted. It appears that the dissemination of information about the requirement of the global commercial law has not been able to accommodate with the globalisation of legal practices. The main reason for the disjuncture between commercial practices and commercial law is public/private separation in international law. The separation between private and public international law is not reflective of an organic or indispensable distinction, but is an analytical

construct that evolved with the emergence of the state.<sup>7</sup> The putative distinction of public and private spheres, the former associated with the state and politics, the latter associated with civil society and economy, forms the false representation in-between.

There is a need to define the role of private international law in the global political economy. Private international law officially functions as a conflict of law that specifies which national law is applicable to global transactions engaging parties from different countries when there is lack of certainty regarding whose law to apply. However, the private international law serves more like public international law and less like a conflicts of law because it expands well beyond economic exchange including a full range of global commercial relations such as the regulation of bankruptcy and antitrust.<sup>8</sup> It is secluded from the public sphere through a barely perceptible analytical move neutralised of political content by the separation presuming the apolitical, impartial and consensual character of economic (private) sphere. The separation maintains strong symbolic meaning and crates a disjuncture between commercial law and commercial practices.

In addition, commercial practices are increasingly recognising the political importance of private actors in the regulation of global commerce but international law remains steadfastly state-centric. The LM works to entrench and deepen the paradoxical exercise of public authority by non-state agents that, as putative “objects” of the law, remain invisible as legal “subjects”. Hence, analysing the status of global companies is paramount as they lack concrete presence in international law. At the same time, they are crucial participants in the creation and

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<sup>7</sup> Claire A Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press 2003)

<sup>8</sup> Claire A Cutler, ‘Locating “Authority” in the Global Political Economy’ (1999) 43(1) ISQ <  
<http://www.jstor.org/stable/pdfplus/2600965.pdf?acceptTC=true>> accessed 12 November 2014

enforcement of commercial laws and seriously challenge the state's monopoly over legislative and judiciary powers in global business. Furthermore, the public/private separation conceals the political significance of non-state actors through obscuring their association with the public sphere as the private sphere in the global political economy is rendered impossible by locating "right to rule" in the public sphere. This figures out in a number of ways in direct connection to the analysis of formations of global authority structure. The political significance of non-state actors, which are major agents of the private sphere and in the creation of the LM, are denied as subjects of the law under dominant legal approaches.

### 3.1.2 A-national Feature of the LM

The global commercial law tends to examine beyond assertive differences of national legal systems by refining common legal values and practices in global trade. Despite the differences being apparent in national legal systems, the global commercial law based on a-national nature manifests a common vision to overcome barriers imposed by the national system of law in the practical needs of a global business community.

The Suez Canal Company is a well suited example to indicate the a-national feature of the LM. After expropriation of the Suez Canal Company by Egyptian authorities, discussions were had regarding the nationality of the company. According to Berthold Goldman, none of the connecting factors usually used by the different national systems (seat of a company, place of incorporation, nationality of the person controlling the company) led attribution of an Egyptian nationality to the company, nor even of another nationality i.e. French or French-English. He stated that the company was a global company and was directly subject to global commercial order due to its capital structure, its management and effects of its business activity.<sup>9</sup> Similarities between the Suez Canal Company and today's global companies such as McDonalds and Starbucks, in particular the scope of their business activities and level of

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<sup>9</sup> Berger (n 6).

management, makes the case of the Suez Canal Company even more relevant and essential to demonstrate the a-national feature of the LM.

The LM is developed without direct connection or hostility towards state laws. However, nations state' loss of their formerly dominant status in global law-making power and the decreased significance of their sovereignty have enabled a reconsideration of the conventional theories of international law. The new living law of the world is fostered not from nature of the traditional legal discourses but from the ongoing self-reproduction of highly specialised and technical global networks of global society.<sup>10</sup> Global legal phenomena is reviving in relative exclusivity from traditional legal theories. Eugen Ehrlich states:

*'The centre of gravity of legal development therefore from time immemorial has not lain in the activity of the state, but in society itself, and must be sought there at the present time'.*<sup>11</sup>

The LM is evolved at the 'periphery' of the legal process, not in the centre of the conventional legal discourses but by way of a 'self-reproducing legal discourse of world-wide vision at each industrial base' in close interplay with the global political economy.<sup>12</sup> Otherwise, to capture the LM in tight meshes of legal positivism would be a grave mistake. The important concern is whether the legal positivism of international law imposes a particularistic language dominant in the global political economy as a universally accepted legal discourse. The LM breaks a classical taboo - a law cannot survive and cannot be enforced beyond the realms of national states and international relations.

Berthold Goldman stated 'that international commercial relations, broadly defined, seem to escape from the grip of state law and even uniform law integrated into the legislation of contracting states. Instead, those relations seem to be managed and governed by norms of

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<sup>10</sup> Gunther T, 'Global Bukowina: Legal Pluralism in the World Society' (1996) Dartmouth <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=896478](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=896478)> accessed 8 August 2015

<sup>11</sup> *ibid.*

<sup>12</sup> Berger (n 5).

professional origin or customary rules, and by principles that arbitral award discover if not develop.’<sup>13</sup>

Therefore, the LM’s a-national feature has a crucial role to correspond the needs of the global political economy and to minimise differences regarding legal thinking.

### 3.1.3 Functions of the LM

The LM has peculiar functions fulfilling the needs and realities of the global political economy whereas legal positivism taking centre stage does not respond to them. These functions of the LM is supported by the Central Enquiry for grasping the concept of global commercial law in legal application. The Central Enquiry provided reliable empirical data as to the use of global commercial law in international legal practice.

- The LM supplements and interprets domestic law as it is approved by the Central Enquiry. 145 addressees (22.69%) of all, 639 usable responses received, addressees and 54.51% of those 266 addressees (who demonstrated their awareness on the use of global commercial law) used the LM to “supplement domestic law” for arbitration.<sup>14</sup> 90 addressees (14.08%) of all addressees and 33.83% of those 266 addressees used the LM to “interpret domestic law” for the arbitration.<sup>15</sup> Therefore, domestic law is not good enough to resolve disputes by itself and the existence of the LM is essential. A typical example of it is: “The validity, interpretation and implementation of this Contract will be governed by the laws of the People’s Republic of China which are published and publicly available, but if there is no published and publicly available law in China pertaining to an particular matters relating to this Contract, reference shall be made to general international commercial practices.”<sup>16</sup>

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<sup>13</sup> Berger (n 6) 367.

<sup>14</sup> Christopher R Drahozal and Richard W. Naimark (ed), *Towards a Science of International Arbitration* (Kluwer Law International 2005) 225.

<sup>15</sup> *ibid.*

<sup>16</sup> *ibid.*, 201.

- The LM supplements and interprets international uniform instruments such as trade usages. In the Central Enquiry, 38 addressees (5.95%) of all addressees and 14.28% of those 266 addressees (who demonstrated their awareness on the use of global commercial law) used the LM to “supplement international uniform law” for the arbitration.<sup>17</sup> 23 addressees (3.60% / 8.65%) of all addressees used the LM to “interpret international uniform law” for arbitration.<sup>18</sup> This also fulfils the important duty of avoiding dilution in the nationalisation of uniform law into a national legal system.
- The LM is an apparatus to boost understanding between parties from different legal orders. According to the Central Enquiry, 83 addressees (12.99%) of all addressees and 31.2% of those 266 addressees (who demonstrated their awareness on the use of global commercial law) used the LM to remove barriers preventing understanding of parties in practice of global trade.<sup>19</sup>
- The LM fills gaps left in commercial contracts. This feature of the LM is more substantive as applicable law isn’t specified in commercial contracts. As seen in Appendix 2, around 20% of commercial contracts did not specify applicable law. In these cases, on what parameters could disputes be resolved? Hence, the existence of the LM is essential.

### **3.2 Sociological Analysis**

A purely legal analysis of the LM is insufficient to indicate why the existence of the global commercial law is a requisite. Even if it is sufficient at a legal base, including only the legal arguments for its existence it does not answer the needs and realities of the global political economy. Analysis of the existence of the LM would not be complete if a sociological analysis was to be disregarded as crucial factors have arisen. These factors have to be taken into account

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<sup>17</sup> *ibid*, 225.

<sup>18</sup> *ibid*.

<sup>19</sup> *ibid*, 226.



to demonstrate the essential nature of the LM in order to provide a common language and a business culture which enables merchants, from diverse legal and political systems, to trade in a stable, fair and safe environment.

Sociological developments that have emerged and that require the sociological analysis of the LM within global society are:

- The dissolution of the cold war and of the north-south conflict
- The increase of the regional and global integration and interaction such as the European Union
- The striking rise in the number of truly global companies through Mega-Mergers and Acquisitions
- The revolution of global communication and information technology like EDI<sup>20</sup>/EDIFACT<sup>21</sup>.
- The massive increase in global economic unification and scope of influence of global economic and societal crisis

Within the sociological analysis, economic factors are becoming prominent. In the context of globalisation, the economic conditions have changed dramatically since the 1960s. The global commercial law has had an increasing importance as the integration of world economies and financial interdependency of national economies have been augmented through export, import and foreign direct investment. The conspicuous economic transformations of the world economy operate as the laboratory for the creation of the global commercial law. Therefore, the LM has emerged into global society in which national boundaries no longer play the roles that they used to fifty years ago.

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<sup>20</sup> Electronic Data Interchange is the exchange of business documents via electronic means between business partners.

<sup>21</sup> EDIFACT is for Electronic Data Interchange for Administration, Commerce and Transport.

## 4 Sources of the LM

Since the creation of the United Nations Commission on International Trade Law (UNCITRAL) in 1966, the notion and effort to codify the general principles of the global commercial law has accelerated. Institutions that stand out in particular in the codification of the global commercial law are UNCITRAL, the International Institute for the Unification of Private Law (UNIDROIT), the United Nations Commission on International Trade and Development (UNCTAD) and the International Chamber of Commerce (ICC). The ICC's approach to accepting the existence of the codification of the global commercial law is noteworthy due to its publication of INCOTERMS (International Rules for the Interpretation of Trade Terms) and the Uniform Customs and Practice for Documentary Credits. The combined effort of all these institutions emphasise the urgent need to improve policies and rules of a global commercial law, which could serve as a reference point for the construction of a codification of a global commercial law without recourse to domestic laws. Hence, recognition of the LM by domestic legislatures would not be a constitutive element of a global commercial law. A project called 'Institutions Concerned with the Unification of Law' with the intention to draft a Model-Basic-Code took place in Rome from the 22<sup>nd</sup> of April to the 24<sup>th</sup> of April, 1968. The idea was to arrange a model of laws and an international convention. Ultimately, it failed because it did not surmount the hurdle of the state sovereignty.<sup>22</sup>

UNIDROIT's report called 'Progressive Codification of the Law of International Trade' states: *"... international trade needs its own ordinary law with its own particular role and full range of functions ... The very fact that the legal relationships of international trade are international*

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<sup>22</sup> Peter K Berger, 'The New Law Merchant and the Global Market Place – A 21<sup>st</sup> Century View of Transnational Commercial Law' (2001) < <http://www.trans-lex.org/2/print/>> accessed 17 November 2015

*in character puts them outside the jurisdiction of municipal law and makes them governable by a law removed from any national contingencies, that is, an ordinary law of international trade, which alone can provide the legal framework which international trade needs in order to develop. . . . Consequently, international trade now, as much as ever, needs a real ius commune mercatorum<sup>23</sup>, a material law can govern international relations . . . . It would be unthinkable . . . either allow international trade to continue to be governed by a host of national laws, since that places it in an impossible question, or to leave all legal problems arising in international trade to be solved simply by practice . . . . So the first task will be to prepare a draft for the general section containing the basic principles which will form the foundations and the framework of the unification”<sup>24</sup>*

All comprehensive approaches have intended to transform various efforts within certain branches of global trade into a universal, world-wide commercial law. The Central Enquiry also contributed to sources of the LM and investigated which general or specific rules and principles in global commerce were being used in global legal practice. This research takes a similar approach to the Central Enquiry’s sources of the LM enabling the use of data received by the Central Enquiry to provide empirical adequacy. Establishing sources of the LM is therefore important to demonstrate the existence and viability of the LM, and displays the preference of the global business community when it comes to the dilemma of hard and soft law.

#### **4.1 Verbal Instruments of the LM**

The global commercial law has been trapped over the last two decades by a codification dilemma. The LM was viewed with substantial scepticism in respect to its sources. However, the LM has been directed towards a codification process with extreme flexibility and openness

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<sup>23</sup> It was legal system of custom and best practice for merchants, being similar to English common law.

<sup>24</sup> Berger (n 22).

that the process needs. There has been an acceleration of the codification process seen with the increasing number of cases submitted to arbitration. It is remarkable witnessing the codification movements of the LM since the 90s through which globalisation's influences on a global commercial law is more palpable in a global society. Besides, the Verbal Instruments of the LM has a crucial place to respond to criticisms in terms of legal predictability and certainty and to prove its existence in discussion of the viability of the LM. Thus, the LM with verbal instruments provides global practitioners to apply the global commercial law in daily legal practices. In addition, verbal instruments of the LM complete the missing link between the global commercial law and global legal practices.

#### 4.1.1 UNIDROIT Principles

The International Institute for the Unification of Private Law (UNIDROIT) is an intergovernmental organisation that was set up in 1940 on the basis of the UNIDROIT Statute. UNIDROIT's purpose is to examine the needs and methods for modernising, harmonising and coordinating the unification of global commercial law, which is seen as private international law<sup>25</sup>, and to formulate its instruments, principles and rules. The UNIDROIT Principles were published in May, 1994 and set forth the general rules for global commercial contracts. The Principles presents a legal framework to the global contractual issues e.g. formation of contract, performance, validity and damages. The absence of global legal principles causes problems for parties particularly in some specific fields at global level such as international agency agreements. Not only do national laws differ from country to country but these laws also fail to take into consideration the nature of global commercial contracts. UNIDROIT Principles comprise non-binding or a "soft-law" instrument of commercial practice which have been

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<sup>25</sup> Private International Law is so called Third Legal System accepting distinction between Private and Public sphere at global level.

adopted by the majority of the global business community.<sup>26</sup> According to Teubner, the LM is a soft law, not a weak law.<sup>27</sup>

The preamble to the UNIDROIT principles sets out the scope of the principles but also defines how and when they can be utilised. The Preamble states:

*These principles set forth general rules for [global] commercial contracts. They shall be applied when the parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by 'general principles of law', 'the lex mercatoria' or the like. They may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law. They may be used to interpret or supplement [global] uniform law instruments. They may serve as a model for national and [global] legislators.*<sup>28</sup>

Therefore, the Principles specify that they “may be applied when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like.” The Principles has the benefit of rendering parties to make a reference to and to apply a set of neutral, concrete and practicable rules and principles. References to the Principles helps legal practitioners to refrain from misunderstandings and misinterpretations which are involved with any dialogue on the practical viability of the global commercial law. This explains why the UNIDROIT Principles were the third most frequently chosen reference to the global commercial law according to the Central Enquiry.<sup>29</sup> The result is compatible with the UNIDROIT Enquiry undertaken in 1997. 59% of the respondents who answered to the study displays that the Principles was applied as guidelines in contract negotiations, 13.1% of the respondents had mentioned to the Principles in support of a solution adopted in an arbitral

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<sup>26</sup> Drahozal and Naimark (n 14).

<sup>27</sup> Gunther T (n 10).

<sup>28</sup> UNIDROIT, 'UNIDROIT Principles of International Commercial Contracts' (2010) <  
<http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf> >  
accessed 13 September 2015.

<sup>29</sup> Drahozal and Naimark (n 14).

award.<sup>30</sup> The repeated reference in both studies is proved by recent studies on the application of the Principles in commercial arbitration. They disclosed that the Principles truly help legal practitioners to reach better answers for global business disputes in order to respond needs of realities of the global political economy.

The UNIDROIT Principles are aimed to set out general rules for global business contracts and have been delineated as a new source for the LM.<sup>31</sup> It has been confirmed that “in view of the fact that the Principles represent a system of rules intended to enunciate principles which are common to the existing national legal systems and best adapted to the special requirements of global commercial contracts. They could be considered as a ‘modern expression of what is commonly called *lex mercatoria*’”.<sup>32</sup> In presenting the Principles, UNIDROIT intended to provide academics and practitioners with a kind of ‘ratio scripta’ of global commercial law.

#### 4.1.2 Principles of European Contract Law

The European Union’s approach is vital to the LM debate because the European Union (EU) is one of the biggest economic powers in the global market. The EU has developed a single market through a unified order of laws to ensure the free movement of people, goods and services. Principles of the European Contract Law (PECL), also known as Lando Principles, entered the global arena in 1999. The principles are designed to be applied as general rules of contract law in the EU. The scope of PECL is stated as follows:

*These principles will apply when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them. These principles may be applied when the parties have agreed that their contract is to be governed by ‘general principles of law’, the*

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<sup>30</sup> *ibid.*

<sup>31</sup> Klaus P Berger, ‘International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts’ (1998) 46(1) *The American Journal of Comparative Law* <  
<http://www.jstor.org/stable/pdf/841080.pdf?acceptTC=true>> accessed 3 February 2016

<sup>32</sup> Peter K Berger, *The Creeping Codification of the New Lex Mercatoria* (2<sup>nd</sup> edn, Kluwer Law International BV 2010), citing Michael Joachim Bonell ‘Das UNIDROIT-Projekt für die Ausarbeitung von Regeln für internationale Handelsverträge’ (1992).

*'lex mercatoria' or the like. These principles may be applied when the parties have not chosen any system or rules of law to govern their contract.*<sup>33</sup>

There are similarities between PECL and UNIDROIT e.g. their scopes and non-binding character. Both sets of principles include rules that contain most dimensions of contract law. The principles have a well-defined content but don't possess certain roles for various purposes due to the lack of a global legal system. However, PECL differs from the UNIDROIT Principles in two important respects. The first difference relates to their geographical reach. While the UNIDROIT Principles aim at the global level, PECL are limited to the regional level, i.e. the Member States of the EU. The second difference crucially missing from the UNIDROIT Principles relates to the nature of transactions that both sets of Principles intend to cover. While the UNIDROIT Principles are limited to global business to business (b2b) transactions, PECL cover both b2b and business to consumers (b2c) transactions. This distinction is important, given that in b2c-transactions, party autonomy is not granted to the same extent as in b2b-transactions in order to allow for higher levels of consumer protection.

The characterisation of the UNIDROIT Principles and PECL as a whole as the *lex mercatoria* depends on their recognition by those associated in global trade. "When the actors on the international trade stage, the parties to contracts, the arbitrators and possibly judges start to use the Principles, the latter may, in due course, grow into a part of the *lex mercatoria*".<sup>34</sup> Thus, the existence of the LM were acknowledged in the original documents of PECL and the UNIDROIT principles, which ends the questioning of whether the *lex mercatoria* exists or has existed as opponents of the LM claimed.

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<sup>33</sup> European Union, The Principles of European Contract Law 2002, Article 1:101

<sup>34</sup> Ana M L Rodriguez, 'Lex Mercatoria' (2002) 53 RETTID  
<[http://law.au.dk/fileadmin/site\\_files/filer\\_jura/dokumenter/forskning/rettid/artikler/20020046.pdf](http://law.au.dk/fileadmin/site_files/filer_jura/dokumenter/forskning/rettid/artikler/20020046.pdf)>  
accessed 01 December 2014, citing Katharina Boele-Woelki, 'Principle and Private International Law – The UNIDROIT Principles and of International Commercial Contracts and the Principles of European Contract Law' (1996).

#### 4.1.3 Trans Lex Principles:

The CENTER for Transnational Law (Central) at the University of Cologne, Germany, presented the TransLex Principles<sup>35</sup> in 1992. It had been updated consecutively in 1993, and 1999 and is still subjected to an ongoing process. The TransLex Principles are a systematic online-collection of principles and rules of global commercial law, the new Lex Mercatoria<sup>36</sup>, being used in commercial arbitration across the globe. Unlike the PECL and UNIDROIT Principles, Trans Lex Principles contain comprehensive comparative law references taken from domestic statutes, court decisions, doctrine, arbitral awards and uniform law. Trans Lex Principles can be *applied* 'if the parties have chosen transnational commercial law, general principles of law, the lex mercatoria or the like'<sup>37</sup> like PECL and UNIDROIT. In this research, Trans Lex Principles are considered important due to two factors:

- Trans Lex Principles would supplement and interpret UNIDROIT Principles and PECL especially if a gap arose in those Principles.
- Trans Lex Principles affirm the existence and viability of a global commercial law and are discovering a clash between territorial limitations of law and the globalisation of world trade.

Although Trans Lex Principles are not as well-known or as accepted as UNIDROIT Principles and PECL, they are still important as a research platform of the LM in order to inspire the codification movements of the LM in the future.

#### 4.1.4 United Nations Convention On Contracts for the International Sale of Goods

The United Nations Convention on Contracts for the International Sale of Goods in 1980 (CISG), also known as the Vienna Convention, is a treaty that comprises a uniform global sales law. As of September 2014, CISG has been ratified by 83 countries from every geographical

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<sup>35</sup> Central, 'Trans-Lex Principles' (1992) <<http://www.trans-lex.org/principles/>> accessed 3 February 2016

<sup>36</sup> This term was chosen by Central Institution in purpose and concept of TransLex Principles.

<sup>37</sup> Central (n 35)



region, every stage of economic development and every major legal, social and economic system, making it one of the most successful global laws. The goal of CISG is to ensure a uniform and fair legal regime for contracts for the global sale of goods.<sup>38</sup> The contract of sale is the core of global trade across the world, irrespective of their legal tradition or level of economic development. The adoption of CISG provides modern, uniform legislation for the global sale of goods and is applied directly, avoiding recourse to the law of conflicts, and adds significantly to the certainty and predictability of global sales contracts. However, CISG regulates contracts for the international sales of goods between businesses and excludes sales to consumers, sales of services and sales of itemised types of commodities such as electricity. The scope of CISG is thus deficient and fragmented. Nevertheless, CISG has been described as having the greatest impact on the global commercial law, and has been functioned by global commercial practices.

As a result, these developments (UNIDROIT Principles, PECL, Trans Lex Principles and CISG) manifest striking change in the debates of LM as a global commercial law. This pictures a change of paradigm towards the global commercial law, and a marked shift away from the dominant and formal rule-making of state-centric agencies to global codification efforts.

## **4.2 Trade Usage**

Trade usage has a prominent role as a source of the LM between commercial rule and practice. Its core meaning is to link commercial law more closely to commercial practice by providing practice for tribunals to consider industry-specific norms of conduct. Some legal instruments accept trade usages to be considered in global commercial practices to interpret and supplement global commercial contracts, such as the American Uniform Commercial Code (UCC) and CISG. The phrase “trade usages” includes codified and uncoded commercial practices in

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<sup>38</sup> UNCITRAL, ‘United Nations Convention on Contracts for the International Sale of Goods’, (2015) < [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html) > accessed 8 October 2015

various trades and industries at changing rate. A substantial question is to what extent trade usages in commercial arbitration are relied on to resolve commercial disputes. There are three parameters to investigate the answer to the question, which are arbitration institution's rule, arbitration statutes and arbitral awards.

Numerous arbitration institutions consider trade usages in their rules when resolving disputes. Appendix 3 classifies arbitration institutions regarding to their rules of trade usages. Among the forty-four arbitration institutions, thirty-two institutions oblige to 'take into account', 'have regard to' trade usages applicable to the relevant disputes. Twelve institutions remain silent on trade usages but they are not prohibited to do so. As seen in Appendix 3, some of the arbitration institutions use the UNCITRAL Rule without modification. The UNCITRAL Rules Article 35(3) provides that "In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction."<sup>39</sup>

The arbitral institutions considering trade usages in their rules are the most chosen institutions in arbitration proceedings, which are seen in Appendix 1. Article 21(2) of the 2012 Rules of Arbitration of the International Chamber of Commerce (ICC) requires that "The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages."<sup>40</sup> The Arbitration Rules of the American Arbitration Association (AAA) article 31 (2) provide that "in arbitrations involving the application of contracts, the tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract."<sup>41</sup> A third large international arbitration

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<sup>39</sup> UNCITRAL, 'UNCITRAL Arbitration Rules' (2010) < <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> > accessed 10 October 2015.

<sup>40</sup> ICC, 'ICC Rules of Arbitration' (2012) < [http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article\\_21](http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article_21) > accessed 10 January 2016.

<sup>41</sup> AAA, 'International Dispute Resolution Procedures' (2014) < <https://www.adr.org/aaa/ShowProperty?nodeId=UCM/ADRSTAGE2020868&revision=latestreleased> > accessed 20 October 2015.

institution, the China International Economic and Trade Arbitration Commission (CIETAC), has a similar rule, which provides by articles 49 (1) : “The arbitral tribunal shall independently and impartially render a fair and reasonable arbitral award based on the facts of the case and the terms of the contract, in accordance with the law, and with reference to international practices”.<sup>42</sup>

Of the arbitral institutions listed in Appendix 3, the London Court of International Arbitration (LCIA), the Stockholm Chamber of Commerce (SCC), the Singapore International Arbitration Centre (SIAC), the Japan Commercial Arbitration Association (JCAA) and the Korean Commercial Arbitration Board (KCAB) do not have rules requiring arbitrators to apply trade usages unless the parties agree otherwise. After analysing the arbitration institution’s approach to trade usages, the following question arose: what legal sources do the arbitration institutions who don’t take into account trade usages base on to its awards to resolve disputes if parties don’t choose applicable law?

Arbitration statutes regulating the role of trade usages in resolving commercial disputes were rare prior to 1985 except the French Code of Civil Procedure published in 1981. Since 1985 as it is seen in the Figure 1, twenty-eight arbitration statutes have been amended to apply trade usages. As a result, twenty-nine of the fifty-eight arbitration statutes contain the provision of trade usage. The main reason behind this dramatic change in national arbitration statutes is the promulgation of the UNCITRAL Model Law on Commercial Arbitration. Its promulgation has been widely accepted as reducing the cost for countries that updated their arbitration statutes. Among the twenty-nine arbitration statutes, twenty-four of them, listed in Figure 1, adopted the UNCITRAL Model Law with some slight variations. Thus, the UNCITRAL Model Law plays an influential role for trade usages to be applicable in arbitration proceedings.

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<sup>42</sup> CIETAC, ‘CIETAC Arbitration Rules’ (2015) < <http://www.cietac.org/index.php?m=Page&a=index&id=42&l=en> > accessed 22 October 2015.

**Figure 1: Arbitration Statutes on Trade Usages<sup>43</sup>**

Requires Consideration of Trade Usages (Non-UNCITRAL)	Follows UNCITRAL Model Law (1985)	Silent on Trade Usages
France (1981)		Japan (1980) Greece (1971) Denmark (1972) Korea (1973) Israel (1974) South Africa (1978) Libya (1980) Malaysia (1980) Norway (1980) Argentina (1981) Indonesia (1981) Luxembourg (1981) Sweden (1981) Turkey (1982) Austria (1983) Saudi Arabia (1983) Poland (1984) Belgium (1985) Portugal (1986) Switzerland (1987) Thailand (1987) Spain (1988)
The Netherlands (1986)	Canada (1986) Cyprus (1987)  Nigeria (1988) Australia (1989) Scotland (1990)	United States (1990) Colombia (1991) Finland (1992)
Romania (1993)	Peru (1992) Bermuda (1993) Bulgaria (1993) Mexico (1993) Russian Federation (1993) Tunisia (1993)	
China (1994)* Italy (1994)	Bahrain (1994) Egypt (1994) Hungary (1994) Singapore (1994) Ukraine (1994) Kenya (1995) India (1996) Malta (1996) New Zealand (1996) Zimbabwe (1996) Hong Kong (1997) Germany (1998) Ireland (1998)	Czech Republic (1994)   Sri Lanka (1995) ** England (1996) Brazil (1996) ***

\*Requires disputes be resolved in “equitable and reasonable manner.”

\*\*Adopts UNCITRAL Model Law but changes trade usage provision.

\*\*\*Requires parties to agree.

The third parameter is arbitral awards through which to discover how often commercial arbitrators rely on trade usages in making their awards. Owing to the confidentiality of the

<sup>43</sup>Christopher R Drahozal and Richard W. Naimark (ed), *Towards a Science of International Arbitration* (Kluwer Law International 2005), 240.

arbitration procedure, there are only a small, non-random sample of arbitration awards published, which most of them are from ICC arbitrations. Moreover, these awards are issued in a heavily edited form, so that it is problematic to determine how or to what extent arbitrators relied on trade usages in justifying their awards.<sup>44</sup> Nevertheless, some conclusions can be deduced from these awards.

Commercial arbitrators give precedence to contract provisions over trade usages when contract terms are clear despite wording of institutional rule. The ICC award 4237 stated:

“Arbitrator shall have regard to terms of the contract and the trade usages to the extent that they do not deviate from the mandatory rules of the applicable law.”<sup>45</sup>

When the contract is unclear or incomplete, arbitrators count on trade usages in their awards in order to supplement and interpret the contract arbitrators often regard both codified and uncoded trade usages in interpreting and supplementing ambiguous and incomplete contract terms. At the Aramco ad hoc arbitration between Saudi Arabia and Aramco in 1958, arbitrators interpreted terms of the contract containing the oil concession, being compatible with the manner accepted in the oil industry. In the award, the tribunal explained that “it cannot overlook the practices and usage of commerce, known by both Parties at the time the Agreement was signed, unless it be prepared to content itself with abstract reasoning and to lose sight of reality and of the requirements of the oil industry.”<sup>46</sup>

Arbitrators also use trade usages in their awards to fill gaps in parties’ written contracts. For example, in ICC Final Award no. 4145 in 1986, the arbitral tribunal corrected the agreement of parties by applying trade usages that are relevant to establish an appropriate commission rate when changed circumstances invalidated the rate provided in their contract.<sup>47</sup>

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<sup>44</sup> Ibid.

<sup>45</sup> Drahozal and Naimark (n 43) 244.

<sup>46</sup> *ibid*, 247.

<sup>47</sup> *Ibid*, 246

### 4.3 General Principles of Global Commerce Law

The LM incorporates general principles of global commerce law, which often require reference to global trade practices. As the ICC has admitted in some of its awards, the LM takes its source in the general principles of global trade. The ICC Award no. 3380 stated that “these general principles of law and justice under contract are, partly, the same as the trade usages, which arbitrators have to take into account anyway.”<sup>48</sup>

General principles of global commercial law are regarded as a component of the LM in two respects. Firstly, general principles of global trade secure the common good in the event of a conflict between parties’ interests and the public interest. Hence, the general principles of global trade are a safety net to protect the common good vis-a-vis parties’ interest. Secondly, the general principles of global law have an essential role in indicating what source of the LM provides a fair, safe and equal legal decisions when contract terms and trades usages are in conflict. Arbitrators might disregard express contract terms in light of general principles of global trade. In ICC Award No. 3820 in 1981, the sole arbitrator sought for the core meaning of the provision on the basis of the fundamental purpose of the contract and global trade practices.<sup>49</sup> A contract for the sale of food products provided that the buyer would open an irrevocable letter of credit in favour of the seller. The issuer of the credit, the buyer’s bank, agreed that it would authorise payment provided that the goods had been received by the buyer. The buyer eventually rejected to take receipt of the goods, and then its bank declined payment. By refusing the goods, the arbitrator denied the plain language of the contract as it is in conflict with the core meaning of the contract because the opener could have received goods if he had wanted to. Therefore, the opener did not act in a reasonable manner accepted in global trade.

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<sup>48</sup> Ibid, 248.

<sup>49</sup> Ibid, 245.

The Central Enquiry asked participants to state exactly which general principles of global commercial law had been referred to in global commercial contracts. The only relevant responses referred to “good faith,” “pacta sunt servanda” and “hardship/force majeure. 34 addressees (5.32%) referred to “good faith/fairness/equity”, 16 addressees (2.50%) to “pacta sunt servanda” and 9 addressees (1.41%) to “hardship/force majeure”.<sup>50</sup>

Good faith is a prominent general principle of global trade law, establishing as a rule of the LM that a contract should be performed in good faith. A powerful point can be made that good faith is a universal trade usage like ICC adopts the good faith duty as a part of global business usage. A leading example that confirmed the role of good faith in global commercial arbitration is the Norsolar award of 1979.<sup>51</sup> In Norsolar, a Turkish claimant investigated damages for breach of an agency agreement by a French respondent. The contract did not ensure for a particular national law to be applied. ICC arbitrators applied the good faith as rule of the LM, given the global nature of the contract and leaving aside any compelling reference to a specific Turkish or French legislation.

#### **4.4 Prior Dealings between Parties**

Arbitrators do not take into account parties’ prior dealings as much as they rely on trade usages, which the occurrence of prior dealings in arbitral proceedings is seldom. The most applied cases of parties’ prior dealing appear in the Iran-United States Claims Tribunal.<sup>52</sup>

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<sup>50</sup> Drahozal and Naimark (n 43) 227.

<sup>51</sup> *ibid.*

<sup>52</sup> Drahozal and Naimark (n 43) 251, citing Jacomijn J V Hof, ‘Commentary on the UNCITRAL Arbitration Rules: The Application by the Iran-U.S. Claims Tribunal’ (1991).

## **5 Requirement of Global Legal Order**

With the above-mentioned concept and sources, a global legal order is requisite to regulate global commercial issues especially given that a global authority structure is the centre of this analysis. But the LM is not only a global issue requiring existence of global legal order. The main argument for the requirement of global legal order is the differences in origin between global issues and local issues, which should be differentiated from each other in order to be regulated. To govern global and local issues under the same legal order is inadequate and unfair because global issues have a different value system and are surrounded by particular circumstances that differs from local issues. Regulating global issues within the same legal framework as that of local issues can cause a disjuncture between practices and theory like global trade. Global issues arise in the global society with an air of informality, speed, flexibility and a dynamic character to grow. The global issues should be conducted under a different legal order, which should not be measured against the circumstances of the local issues adopted by a state-centric approach. This process is detached from domestic legal systems and escapes the realms of domestic lawmakers, which is limited to the territory of its respective jurisdiction. The features of the global issues can be explained by differentiation within the global society. The LM as a regulator of global trade issues is the most successful example of global law but it is not the only one. Various groups and classes within global society involved in particular global issues relevant to this research are developing a global law of their own.

A similar combination of globalization and technicality can be found in various branches of law. Human right issue and sport issues are one of the most striking example of global issues. Human Rights' issues have become globalized by pressing their own professional and technical regulation as well as lex sportiva where the Court of Arbitration for Sport (CAS) is an important



judicial body that settles disputes related to sport. It is inevitable that globalisation of law will follow as a spill-over effect of the mentioned developments. Therefore, within this context, globalisation indicates a shift of prominence in the primary principle of differentiation: a shift from territorial to functional differentiation on the global level.<sup>53</sup>

However, a worldwide unity of the law would become or be seen as a threat to local legal cultures but local courts existing under national laws will protect legal cultures at different regions as well as local issues.

The denationalisation of the legal process of global issues has been observed within arbitration especially within global trade. This has an important impact on legal theories. The denationalisation of global issues draws all attention to the relationship between global rule-making and legal theory, which is crucial for the future direction of the LM and the structure of global authority. Within this context, the LM is accepted as a private ordering that avoids inefficient laws enacted by national governments in order to respond to the needs of the global trade. The Central Study that conducted a reliable and world-wide empirical study on the viability of global commercial law, like the majority of legal doctrine receives the LM as a part of the Private International Law, also known as the Third Legal System. The Central Study takes the Third Legal System as an independent, apolitical and autonomous legal system alongside domestic law (first legal system) and public international law (second legal system). As mentioned above in reference to the disjunction between commercial practice and theory, the third legal system allows a separation between a public and private sphere which is not reflective of a natural and inevitable distinction that advanced with the emergence of the state. The distinction between a private and public sphere also maintains a set of rigid conceptual

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<sup>53</sup> Gunther T, 'Global Bukowina: Legal Pluralism in the World Society' (1996) Dartmouth <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=896478](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=896478)> accessed 8 August 2015, citing Niklas L, *Das Recht der Gesellschaft* (1993).

distinctions: they are the distinctions between Economics / Politics and Civil Society / National States. Moreover, the dominant theories of international law and economics are premised upon the liberal “art of separation” wherein markets and civil society are regarded as separate and distinct from politics, governments and state.<sup>54</sup>

The distinction between a public and private sphere satisfies all elements of traditional theories of law by taking a state-centric approach in the public sphere. In the private sphere the law is created by the behaviour of global actors in global commercial transactions. The legal impact and nature of the business activities of global companies, due to their size and the global impact of their business activities, escapes the realms of nation states and function according to their own rules and principles. The complexity of the LM in which the contested nature of the relationship between public and private trade law operate and the location of the LM within this legal framework contribute to a lack of understanding of its significance. It may cause lawlessness of arbitration. There is therefore only one method left; *contract sans loi* “contract without law”. The phenomenon of *contract sans loi*, also known as the autopoiesis system, is a self-reproducing, universal legal discourse which narrows the boundaries to the use of the legal/illegal binary code and regenerates itself by processing a symbol of global validity.<sup>55</sup> Apparently, any self-validation of contract drives directly into the paradox of self-reference (valid – not valid – valid – not valid ...), which results in deadlock. This situation demonstrates the essential nature of global legal order for global issues. Hence, the LM has the potential to be regarded as both a constitutive element of the global commercial order and an attribute of the global legal order that an example to other global issues such as human right and environmental issues.

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<sup>54</sup> Claire A C, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press 2003)

<sup>55</sup> Gunther T (n 53).

## 6 Recognition of the Concept of the LM

The LM's concept is explicitly or tacitly recognised by the majority of global actors and especially by national states. It is the only formally accepted subject within traditional legal theory against which the concept of the LM is established. There are international treaties and institutions that reinforce the existence and recognition of the LM as an autonomous and independent global set of commercial rules.

As previously mentioned, in the Preamble of the UNIDROIT Principles and the PECL, the scope and purposes of both principles are explained as so: "These Principles may be applied when the parties have agreed that their contract is to be governed by 'general principles of law', the 'lex mercatoria' or the like." UNIDROIT is an intergovernmental organisation and studies the methods of modernising, harmonising and coordinating model laws and international conventions. As of 2014, the UNIDROIT has 63 member states, all major economic players in the global market. The recognition of the LM by UNIDROIT and the European Union is extremely advantageous to the viability of the global commercial law being accepted by major global players in broad geographical regions and in major legal, social and economic systems. The Central Enquiry provides some indicators that support the recognition and acceptance of LM in practice. According to the Central Enquiry, 'General Principles of Law' was the most often chosen terminology followed by 'Lex Mercatoria' and 'UNIDROIT Principles'.<sup>56</sup> Reference to Global Commercial Law was frequently made in the Enquiry too. However, this figure is not very indicative because the LM, namely the global commercial rules, is regarded as a catch-all category in this thesis.

The United Nations Commission on International Trade Law (UNCITRAL) is a prominent and influential institution for the recognition of the LM. UNCITRAL is a legal body with universal

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<sup>56</sup> Drahozal and Naimark (n 43) 222.

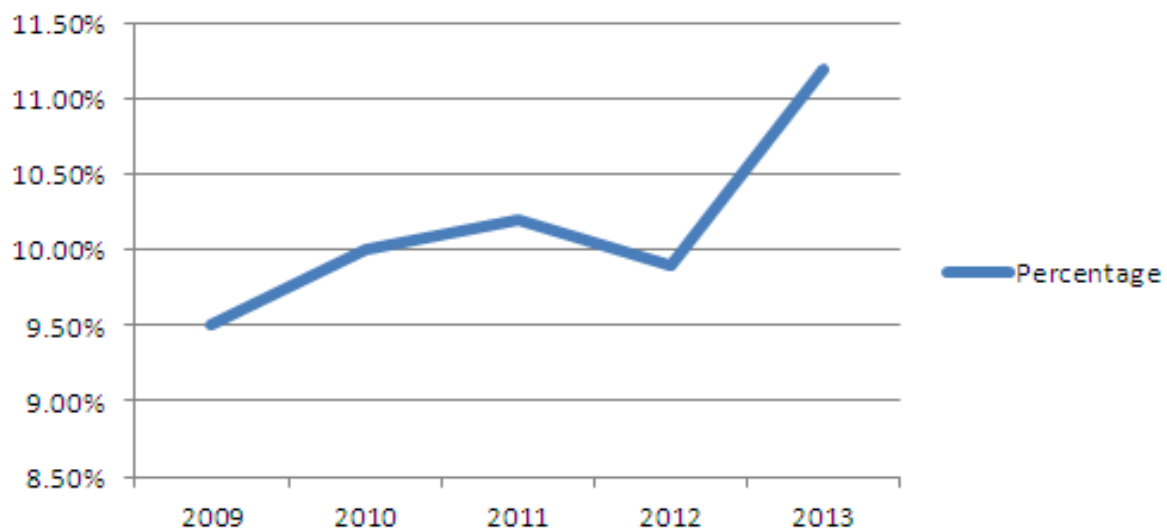
membership and has specialised in worldwide commercial law reform for over 40 years. It represents the level of economic development and geographic regions from different legal traditions. One of UNCITRAL's primary tasks is to further progress in harmonisation and unification of the law of global trade by coordinating works of organisations and encouraging co-operation within the field. It plays an important role in the codification of the principles and rules of global commercial law. The UNCITRAL Rule is accepted without modification by some of the arbitral institutions as seen in the Appendix 3. Moreover, the UNCITRAL Model Law on Commercial Arbitration has been accepted widely and reduced the cost of updating arbitration statutes to countries as ease of adoption played an important role in those countries' decisions to adopt the Model Law. Therefore, UNCITRAL has carried a crucial role in the recognition and approval of LM, knowing that the LM's status as the global commercial law would be impossible to be accepted without arbitration mechanism.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is a judicial constitution of the dispute resolution mechanism for global trade. The main aim of the New York Convention is to reduce the obstacles to global trade particularly those associated with conflict of laws as the Convention attempts to unify a broad area of commercial rules at a global level. Although national states are the only subjects to have judicial power as well as executive and legislative powers in traditional theories of law, it is ironic that states and state entities accept the arbitration mechanism at an increasing rate vis a vis traditional theories of law as seen Figure 2. The involvement of states in the ICC arbitration increased in 2013. The number of cases in which at least one of parties was a state or under state control rose to 86 cases in 2013, from 75 cases in 2012.<sup>57</sup>

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<sup>57</sup> ICC, *2013 Statistical Report* (2014) 25(1) ICC Int Court of Arbitration Bulletin.

**Figure 2: States and State Entities in ICC Arbitration<sup>58</sup>**



There are a number of awards where arbitrators decided to apply the LM or some other variety of transnational or international rules or principles although publications in which the LM was resorted to are limited. However, available publications, such as the ICC International Court of Arbitration Bulletin, the Mealey's International Arbitration Report and the Journal du Droit International contain extracts of various awards wherein the tribunal purported to apply global commercial law.<sup>59</sup> The ICC is a prominent arbitral institution for the recognition of the LM. In 1995, an ICC arbitral tribunal resorted to the LM and justified this step as follows:

*The application of international principles of commercial law offers many advantages. They apply in a uniform manner and independently from the particularities of domestic laws. They take into account the needs of international commercial relations and allow a fruitful exchange between legal systems which are frequently linked in an exaggerated manner to conceptual*

<sup>58</sup> ICC, 'ICC Court further extends worldwide reach in 2013' (2014) < <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Articles/2014/ICC-Court-further-extends-worldwide-reach-in-2013/> > accessed 10 January 2015.

<sup>59</sup> Bernardo M Cremades and Steven L Plehn, 'The New Lex Mercatoria and The Harmonization of The Laws of International Commercial Transactions' (1984) 2(3) The Boston University International Law Journal < [http://heinonline.org/HOL/Page?handle=hein.journals/builj2&div=24&g\\_sent=1&collection=journals#](http://heinonline.org/HOL/Page?handle=hein.journals/builj2&div=24&g_sent=1&collection=journals#) > accessed 7 January 2016.

*distinctions on one side and those who seek fair and pragmatic solutions for individual cases on the other. It is thus an ideal opportunity to apply in this arbitration what is more and more called the lex mercatoria.*<sup>60</sup>

## **7 Criticisms of the LM**

In some areas of legal doctrine, the LM is viewed with sceptical criticism. Principles and notions of the LM have been criticised for being too vague and too broad, which is relevant to legal certainty and predictability attached by international legal practice. It is also argued that the LM does not hold any binding force since it has not been enacted by state-centred system 'legal positivism'. In spite of this, the LM has a mechanism of coercion to obtain compliance with effective boycott sanctions such as black lists, damage to commercial reputation and suspension from trade associations' members' rights. These criticisms are served as the standard arguments against the LM.

It is really important to highlight again, as mentioned above, to compare global commercial law with domestic law is futile because each one has its own dynamics and characteristics. The LM disapproves the traditional definition and theory of law because it does not derive from the command of sovereign states. Therefore, the LM certainly belongs to a "domain of law" and its domain is the globe. Stating that global commercial law does not have the binding force and definitive quality of domestic law is like comparing an apple with a pear.

The Central Enquiry asked respondents why parties did not refer to global commercial law and to give a list of reasons. The outstanding reasons chosen by the respondents were "incomplete legal system", "vagueness", "certainty, predictability", "no experience", "no information",

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<sup>60</sup> Klaus P B, 'The New Law Merchant and the Global Market Place – A 21<sup>st</sup> Century View of Transnational Commercial Law' (n 62).

“enforcement concerns” and “no case law”. The Central Enquiry displays that incompleteness of the LM and enforcement concerns do not play a major role because in arbitration 7 addressees (1.09%) referred to “incompleteness” and 7 addressees (1.09%) to “enforcement concerns”.<sup>61</sup> Even though the enquiry did not include “vagueness” and “uncertainty” as choices, vagueness and uncertainty were cited as reasons that parties did not agree to use global commercial law<sup>62</sup>. Responses indicating to the vagueness and uncertainty of the LM are by far outweighed by those replies that refer to the lack of practical experience and the fact that no information has been available on the subject of global commercial law<sup>63</sup>. According to the Central Enquiry in the category of arbitration, 17 addressees (2.66%) referred to “vagueness” and 25 addressees (3.91%) to the lack of “certainty and predictability” while 184 addressees (28.79%) referred to their “lack of experience” and 100 addressees (15.65%) to the lack of information available.<sup>64</sup> When evaluating the data, incompleteness and legal certainty of the LM’s rules are no absolute and dominant values. As Teubner stated, it is not the presence of a well-established and elaborated set of legal rules and policies which determine over the viability of global commercial law.<sup>65</sup> The certainty and determinacy of legal rules and principles is misleading. The existence of a detailed body of rules is not determinant or preferable as specific rules initially providing determinacy soon become obsolete. On the other hand, the publication of the CISG, PECL and UNIDROIT Principles suggest the LM can now be served by the rules that are predictable, consistent and complete. It can be taken to court by referring page and article number and therefore contributes towards making LM provable and workable. Even Lord Mustill attributed much of his criticism on the lack of the actual essence

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<sup>61</sup> Drahozal and Naimark (n 43) 228.

<sup>62</sup> *ibid.*

<sup>63</sup> *ibid.*

<sup>64</sup> *ibid.*

<sup>65</sup> Gunther T (n 53).

of the *lex mercatoria* but he refuted his own assertion and proved that the *lex mercatoria* actually exists, finding and using twenty fairly general principles himself.<sup>66</sup>

The main reason behind the criticisms of the LM is that many practitioners lack the necessary experience and information about the use of the LM. In the opinion of many addressees, as accepted by the Central Enquiry, the inadequacy of knowledge about the LM would bring about a need for explanation and therefore use up too much time during arbitration. It is really important to note that pragmatic incentives appear to prevail among legal practitioners over main dogmatic reservations. In fact, the acceptance of the global commercial law is important for the evaluation of its pros and cons. Without information and a legal order, however, the global commercial law does not stand a chance of being accepted by global legal practitioners. Researches also revealed the practitioners lack of knowledge regarding CISG and the UNIDROIT Principles.<sup>67</sup> It can be confirmed that this lack of knowledge and practice is one of the reasons why a large number of addressees hesitate to prefer the LM as an applicable law within arbitration. However, it is valuable to determine the significance of the actual resort and to evaluate the parties' approaches to the LM as an applicable law in contemporary commercial practice. The reality is that the needs of a global political economy increase in the context of globalisation with respect of global trade. It is important to respond properly to these needs in time and place in order to assess the viability of the concept of the LM. An overriding question is how often and to what extent is the LM applied to resolve global commercial disputes within arbitration? In order to discover the answers to these questions, existence of empirical evidences supporting the practice of the LM is crucial. Empirical evidences will be evaluated by the following chapter.

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<sup>66</sup> Ralf M, 'The True *Lex Mercatoria*: Law beyond the State' (2007) 14(2) *Ind J Global Legal Stud* <[http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2476&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2476&context=faculty_scholarship)> accessed 10 December 2014

<sup>67</sup> Drahozal and Naimark (n 43).



## **Chapter 3**

This chapter examines the application of the LM as an applicable law in contemporary commercial practices in order to analyse the practicality and awareness of the global commercial law within arbitration. The crucial questions analysed in this chapter are how and to what extent the LM can be used in everyday legal practice during arbitral proceedings. However, the arbitration mechanism will be scrutinised first because the existence of the global commercial law would be meaningless without the arbitration mechanism. To assess the stakeholder parties' approach toward the LM, arbitration is fundamental for the evaluation of the global commercial law. Additionally, the denationalisation of the legal process of global issues has been observed within arbitration especially in global trade. Thus, the arbitration mechanism serves as a natural jurisdiction of the LM and strengthens the viability and existence of the global commercial law as a judicial power.

### **1 Is Arbitration Really a Way of (Alternative) Dispute Resolution?**

Arbitration is a mechanism that provides an adjudicatory platform for dispute resolutions of global issues (mostly), which aims to minimise influences of national states from this procedure. Arbitration is a pre-requisite institution for discussions of existence and viability of the Lex Mercatoria (LM). Without this mechanism, the LM would not have the features and conception of an independent and autonomous global commercial law. Therefore, it is impossible to separate the subject of the existence and viability of the LM from within arbitration because arbitration forms an adjudicatory body of the LM. In order to capture the roles of arbitration in the discussions of the LM, it is key to consider how arbitration's functionality is considered by the parties choosing arbitration in their contracts as a way to resolve disputes. A crucial question in the context of globalisation is to inquire whether

arbitration is an alternative way of dispute resolution vis-a-vis litigation or a preferable method. However, arbitration is classified in legal doctrine under the alternative forms of dispute resolution (ADR) with mediation, conciliation, negotiation and early neutral evaluation. Arbitration is one of the developments and unifications of legal institutions and services as the legal dimension of globalisation. It is, more importantly, a way to devise new ways of meeting different kinds or sources of conflicts and to resolve them in conformity of the requirements of the global political economy for the benefits of mankind. In this research, arbitration is therefore called another form of litigation rather than a way of alternative dispute resolutions as arbitration within global commerce is becoming the preferred way to resolve disputes arisen of global issues. As seen in Appendix 1, the number of cases filed by arbitration institutions from 1993 to 2003 increased significantly. In addition, International Arbitration Survey on Improvements and Innovations in International Arbitration in 2015 showed that 90% of respondents preferred arbitration as dispute resolution mechanism for the resolution of their cross-border disputes.<sup>1</sup> In the 2015 International Arbitration Survey, the wider respondent group, seen in the Figure 1, showed a strong preference for arbitration in comparison with another survey published in 2006 that “73% of respondents preferred to use [global] arbitration, either alone (29%) or in combination with Mediation or other amicable settlement techniques in a multi-tiered dispute resolution process (44%)”.<sup>2</sup>

Moreover, the 2,120 parties involved in the cases registered in International Chamber of Commerce (ICC), 2013 came from 138 countries worldwide which 80% of the cases were

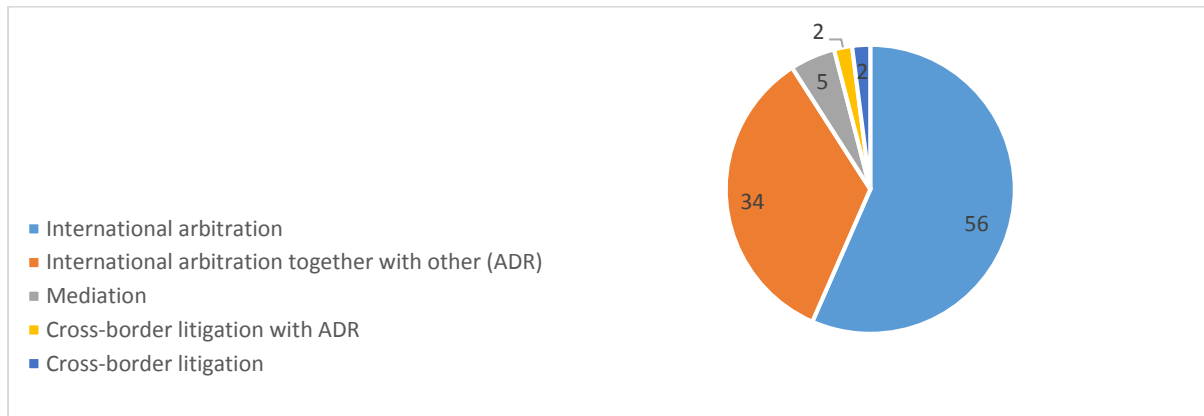
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<sup>1</sup> The School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London and White & Case LLP, ‘The International Arbitration Survey on Improvements and Innovations in International Arbitration’ (2015) < <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> > accessed 14 December 2015

<sup>2</sup> The School of International Arbitration and Queen Mary University of London, ‘International arbitration: Corporate attitudes and practices’ (2006) 2 < <http://www.arbitration.qmul.ac.uk/docs/123295.pdf> > accessed 16 December 2015

cross-border disputes between parties of different nationalities, and 66% were between parties from different regions of the world.<sup>3</sup>

**Figure 1: What is your preferred method of resolving cross-border disputes?<sup>4</sup>**



• Please note that due to rounding, some percentages shown in the charts may not equal 100%.

One of the major reasons why arbitration is a globally preferred dispute resolution system is the 1958 New York Convention on Recognition and Enforcement of Arbitral Awards. The New York Convention Article 1 states that “ This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal”.<sup>5</sup> Accordingly, the recognition and enforcement of foreign arbitral awards is assured in most parts of the world to a much greater extent than can be said for the recognition and enforcement of judgments of national courts. This result is

<sup>3</sup> ICC, ‘2013 Statistical Report’ (2014) 25(1) ICC Int Court of Arbitration Bulletin.

<sup>4</sup> The School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London and White & Case LLP (n 1) 5.

<sup>5</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958) 330 UNTS 38.

confirmed in the 2015 International Arbitration Survey, declaring that enforceability of awards is seen as arbitration's most valuable characteristics.<sup>6</sup>

The most striking determination of the importance of the New York Convention is made by Pierre Bellet: "If for judgments there existed a convention similar to the New York convention, 50% of the big [global] commercial arbitrations would be court litigation."<sup>7</sup>

However, as Professor Schmitthoff indicates in 1982, "the establishment of an international convention on some aspects of [global] trade law is usually a slow and arduous process and, even if the convention is eventually signed, it is by no means certain that it will find favour with the [global] business community."<sup>8</sup> Yet, the 1958 New York Convention on the Recognition and Enforcement of Arbitration Awards is an exception to that and one of the most successful treaties regulating global trade.

When it comes to investment arbitration, arbitration becomes more common ground for resolving disputes engaging national states, showing acceptance of the arbitration mechanism by national states. The investment arbitration has a unique and ironic feature indicating that national states engaged with investment treaties accept to resolve disputes within arbitration, namely not within national courts. The irony is investment arbitration engages disputes arising from the public capacity of national states as opposed to the private capacity of those, which national states waive its adjudicatory sovereignty in favour of arbitration as a global dispute resolution mechanism. Since the late 1960s in which there were a few of investment treaties, the investment arbitration has evolved to over 2,000 bilateral and regional investment

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<sup>6</sup> The School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London and White & Case LLP (n 1).

<sup>7</sup> Christopher R Drahozal and Richard W. Naimark (ed), *Towards a Science of International Arbitration* (Kluwer Law International 2005) 37.

<sup>8</sup> Bernardo M Cremades and Steven L Plehn, 'The New Lex Mercatoria and the Harmonisation of the Laws of International Commercial Transactions' (1984) 2(3) Boston University International Law Journal 322 <[http://heinonline.org/HOL/Page?handle=hein.journals/builj2&div=24&g\\_sent=1&collection=journals#citation\\_tab\\_box](http://heinonline.org/HOL/Page?handle=hein.journals/builj2&div=24&g_sent=1&collection=journals#citation_tab_box)> accessed 20 December 2015, citing Schmitthoff M C 'Nature and Evolution of the Transnational Law of Commercial Transactions'.

agreements providing arbitration for investment disputes involving states. Therefore, arbitration has an important place for investment disputes in order to display national states' inclination to arbitration.

## **2 Methods of Arbitration**

Arbitration is categorised into two types - ad hoc and institutional arbitrations. Institutional arbitration takes a role of administering the arbitration process by providing a framework of administration to assist in the process. There are well-known arbitration institutions worldwide such as the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the Hong Kong International Arbitration Centre. Institutional arbitrations have their own rules operating a standard contract terms that parties can combine by reference into their arbitration agreements. Instead of drafting and negotiating a complete set of arbitration rules which is time consuming, parties can opt for a set of rules prepared by the arbitration institutions. But if the entire basket of standard terms is not chosen, parties are free to customise the institutional rules in their arbitration clause. Therefore, institutional arbitrations save parties and their legal representatives the effort of determining the arbitration procedure and of drafting arbitration clauses in order to ensure the arbitration proceedings begin in a timely manner.

In ad hoc arbitrations, arbitration tribunals are designated by parties or an appointing authority elected by the parties. In that case, parties establish all components of the arbitration themselves: the number of arbitrators, place of arbitration, choosing the applicable law and the procedure for governing arbitration. Decisions on these matters by parties may cause problems to proceed on arbitral proceedings and commercial relations in the long term. For example: the appointment of arbitrators is important for the neutrality of arbitration proceeding, which is one of the major differences between ad hoc and institutional arbitration. In Douglas Earl

McLaren's report, preferences of American in-house lawyers are split as to the impartiality of party-assigned arbitrators because a significant minority favoured that party appointed arbitrators needn't be neutral.<sup>9</sup> However, in institutional arbitrations, parties have a list of qualified arbitrators possessing necessary skills, experience and expertise to choose from but it is up to the institution to make an appointment due to the lack of competence or impartiality. In order to enhance the LM as part of a global legal order, externalisation of adjudication is crucial at institutional arbitration dealing with many contracts than ad hoc arbitration, which legal order emerges by transcending individual contracts. In this research, institutional arbitrations are cornerstone to analyse the significance of and to establish the role of the LM. Therefore, this thesis focuses on institutional arbitration rather than ad hoc arbitration due to the arbitration institutions' critical position in the discussions of the viability of the global commercial law as living space for the LM. Besides, in the 2015 International Arbitration Survey, 79% of the respondents chose arbitration institutions to administer the proceedings over the past five years, which is consistent with results in former surveys of 73% (2006) and 86% (2008) of arbitrations being institutional rather than ad hoc.<sup>10</sup>

### **3 Features of Arbitration**

The number of arbitration proceedings has increased remarkably over the last two decades as seen in Appendix 1 and in the 2015 International Arbitration Survey. The vast majority of those proceedings involve pre-dispute agreements to arbitrate i.e. arbitration clauses in contracts. Hence, arbitrators are more willing than national courts to respect parties' freedom of choice such as the applicable law clause in which parties choose rules of decision to arbitrate their global disputes.

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<sup>9</sup> Drahozal and Naimark (n 7).

<sup>10</sup> The School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London and White & Case LLP (n 1) 17.

The question that arises is why parties choose a form of arbitration. There are a variety of characteristics of arbitration cited mostly, including neutrality of arbitral forum, speed of arbitral process, cost of arbitration and receipt of monetary award. But a critical matter is in what proportion each feature of arbitration is seen as an advantage. There are generally accepted advantages of arbitration for which parties choose to resolve disputes or what the main impetus is behind parties' preferences for arbitration. In order to identify those advantages playing main roles for parties' choice of arbitration, empirical support is paramount to determine true features of arbitration rather than ones being accepted by hearsay.

This research takes into consideration three surveys to analyse the true advantages of arbitration,

- Advantages of Arbitration on Arbitration and Settlement in International Business Disputes by Christian Buhring-Uhle<sup>11</sup>
- Expectations and Perceptions of Attorneys and Business People on International Private Commercial Arbitration by Richard W. Naimark and Stephanie E. Keer<sup>12</sup>
- 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration<sup>13</sup>

Why parties chose arbitration to resolve disputes was answered by Christian Buhring-Uhle's survey stating that the two most important reasons are to refrain other parties' home court system and to take advantage of the global legal framework governing the enforceability of arbitration awards.<sup>14</sup> In other words, the reason arbitration has become the principal means of dispute resolution in global trade has more to do with the specific problems of litigating global

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<sup>11</sup> Drahozal and Naimark (n 7).

<sup>12</sup> *ibid.*

<sup>13</sup> The School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London and White & Case LLP (n 1).

<sup>14</sup> Drahozal and Naimark (n 7).

disputes in national courts than with the desire to create a type of procedure that is fundamentally different from litigation.

### **3.1 Advantages of Arbitration**

To analyse this section, the three above-mentioned surveys are central to the discussions and provide empirical support demonstrating an insight to the stakeholder's approach to arbitration. The first survey examining the perceptions of participants with regard to the reasons to choose arbitration over litigation is the Arbitration and Settlement in International Business Disputes by Christian Buhring-Uhle from November 1991 to June 1992. The survey presented the number of commonly declared advantages of arbitration and asked whether these advantages exist, if so, and then how relevant those advantages are to the preference of the parties for arbitration. The participants were asked to rank the given advantages on a scale of "highly relevant (3)", "significant (2)", "one factor among many (1)", "not relevant (0)" and to "advantage does not exist (-1)". However, there is no definite distinction between arbitration and litigation. Responses varied considerably according to geographical groups because each country's litigation system has its own manner that differs from one country to another as seen in Figure 4.

The two advantages identified by the participants as the most significant factor are "neutrality of the arbitral forum" and "the enforceability of arbitration awards".<sup>15</sup> On a scale from -1 ("advantage does not exist") to 3 ("highly relevant"), the sum of the participants' answers for the most significant advantages amounted to 2.4, which places them almost halfway between "significant" and "highly relevant".<sup>16</sup> These two most significant advantages draw all attention to two fundamental problems of litigation which are neutrality of the national court and the competence of its legal framework as in enforceability. Parties in global commerce don't seem

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<sup>15</sup> Ibid, 31.

<sup>16</sup> Ibid, 31.



to select litigation as a means of global commercial dispute resolution because they are not confident with the neutrality of the national courts towards foreign litigants and the enforceability of their decisions especially when one of the parties is a state or a state-owned entity.

The second tier of the most important advantages by order of relevance are “confidentiality of the procedure”, “expertise of tribunal”, “absence of appeals” and “limited discovery”. Within this group of arbitration advantages, the confidentiality of the procedure attained the highest relevance, having a score of 1.8 close to “significant”.<sup>17</sup> The confidentiality simply means the public is excluded from the arbitration proceedings and could not access any details of the arbitration cases because arbitration awards are not published and publicly available. Due to strict confidentiality, it is a drawback that no mechanism exists among arbitration institutions to ensure consistency of arbitral awards. This causes non-existence of case law at the cost of predictability of outcomes. The other three advantages have relevance to the midpoint between “one factor among many” and “significant”, which were placed with a score: expertise of tribunal (1.6), absence of appeals (1.5) and limited discovery (1.3).<sup>18</sup>

Slight advantages of arbitration according to the survey taken by Buhring-Uhle are “speed of the procedure”, “amicability of the procedure” and “voluntary compliance with arbitration awards”. These advantages were placed somewhere between “one factor among many” and “not relevant”, which the average relevance is 0.7 for both the speed and amicability of arbitration and 0.5 for the voluntary compliance.<sup>19</sup> There is a necessity for further explanation to clarify some advantages of arbitration in order to prevent their misperception by the stakeholders. The speed and cost of arbitration are therefore subject to specific questions discovering their effectiveness in Buhring-Uhle’s survey. But, making the statement that

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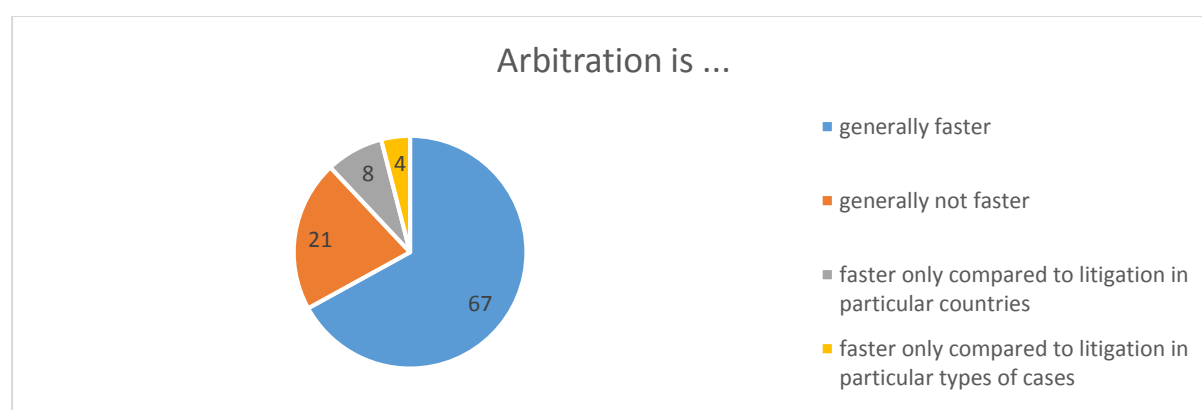
<sup>17</sup> Christopher R Drahozal and Richard W. Naimark (ed), *Towards a Science of International Arbitration* (Kluwer Law International 2005) 32.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

arbitration is faster or cheaper than litigation and vice versa is abstract and complex through making direct comparisons in between because arbitrators decide different cases from courts. Therefore, comparing the average cost and speed of arbitration cases to court cases is not meaningful, particularly considering that court systems differ across countries. However, as seen in the Figure 2, two thirds of the respondents consider arbitration as being generally faster than litigation. 12% of the respondents thought that arbitration was faster than litigation either in specific countries or in certain types of cases.

**Figure 2: Speed Compared to Litigation<sup>20</sup>**



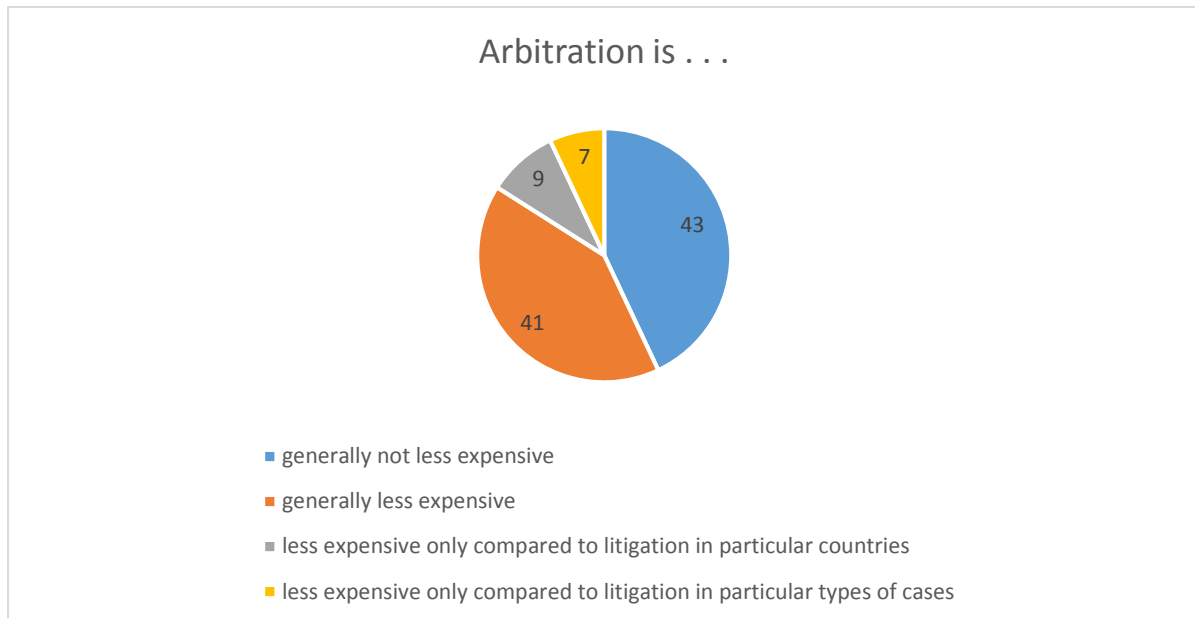
The lowest ranked advantages out of 11 hypothetical arbitration advantages are cost of arbitration and predictability of arbitration awards, which figured somewhere between “not relevant” and “advantage does not exist”. The aggregate relevance amounted to 0.2 for the cost advantage and -0.5 predictability of arbitration awards.<sup>21</sup> One of the main reasons engendering unpredictability of arbitration awards seen by this thesis is the non-existence of global commercial law. In order to respond needs of the global political economy, LM is essential and vital to provide consistency of arbitration awards, being pursuant to exigencies and requirements of the global political economy. As seen in Figure 3, 41% of the respondents of

<sup>20</sup> *ibid*, 40.

<sup>21</sup> *ibid*, 33.

the survey thought that arbitration is less expensive than litigation whereas 43% the respondents stated the opposite.

**Figure 3: Cost Advantage Compared to Litigation<sup>22</sup>**



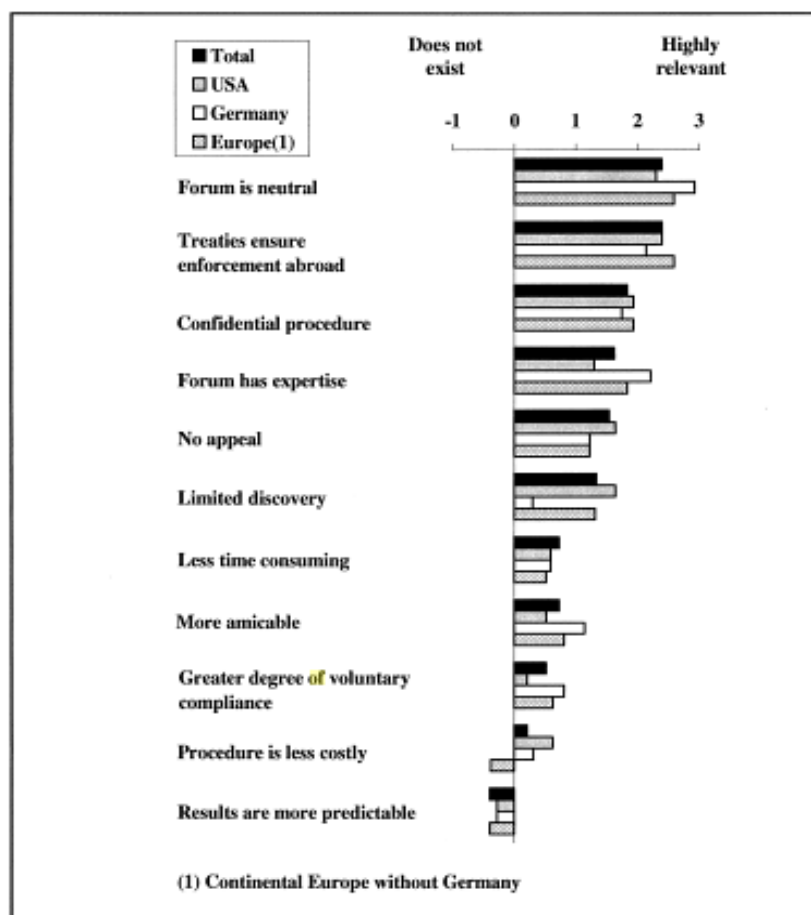
As mentioned above, differences in responses among groups must be taken into consideration to assess significant differences among groups based in varied geographies and legal traditions. For instance; Americans are sceptical regarding the speed of arbitration but positive about the cost than the rest of the sample as seen in the Figure 4. Buhring-Uhle's survey also analysed the differences among groups based on geography (American, German and other continental European participants), experience (respondents having participated in over 30 cross-border arbitrations) and function (in-house counsel).<sup>23</sup> According to Figure 4, two striking divergences draw attention with regard to two of the hypothetical advantages: the cost and the limited discovery. The consideration of the limited discovery was recognised least important

<sup>22</sup> *ibid*, 39.

<sup>23</sup> *ibid*, 34.

by the Germans (0.3), while a relevance factor for overall group of this matter is amounted to 1.3. As for the cost consideration, while Americans and Germans recognised a slight cost advantage, generating a relevance factor of 0.6 and 0.3 respectively, the group of other continental Europeans were dubious with a significance factor of -0.4.

**Figure 4: Advantages of Arbitration<sup>24</sup>**



The second survey analysing attributes of arbitration is a study of the expectations and perceptions of attorneys and merchant community on arbitration and is conducted by Richard W. Naimark and Stephanie E. Keer. The survey investigated the expectations and perceptions

<sup>24</sup> Drahozal and Naimark (n 17), 35.

of participants from American Arbitration Association (AAA) in pending disputes only, rendering a list of eight factors to rank in order of importance. An overwhelming majority of the participants (81%) considered a “fair and just result” as the most important factor; nearly twice as significant as next closest rankings.<sup>25</sup> The following attributes of arbitration in the survey are cost (46%), speed (46%), receipt of monetary award (43%) and arbitrator expertise (41%).<sup>26</sup> A striking consequence of the fair and just result was that its post-case rankings are higher than its pre-case rankings. Therefore, issues that are most important prior to arbitration maintained their importance after the awards were rendered. The reason why the fair and just result were chosen as the most important attribute is interpreted in this research as another way of stating neutrality. Thus, the role of the existence of the LM corresponding requirements of the global political economy as a legislation would make contributions to the neutrality of arbitration. Another intriguing result of the survey is the participants’ view of privacy of arbitration and the potential to maintain a future commercial relationship with the other party. The participants ranked for both of these attributes relatively unimportant factors to arbitration. Naimark and Kerr elucidated that “subsequent discussions with arbitrators in a round-table setting revealed a view that privacy is an often overrated attribute” in global arbitration.<sup>27</sup>

The last survey to be analysed is the 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration. The most valuable characteristics of arbitration in the survey are “enforceability of awards”, “avoiding specific legal systems”, “flexibility” and “selection of arbitrators” as seen in the Figure 5.

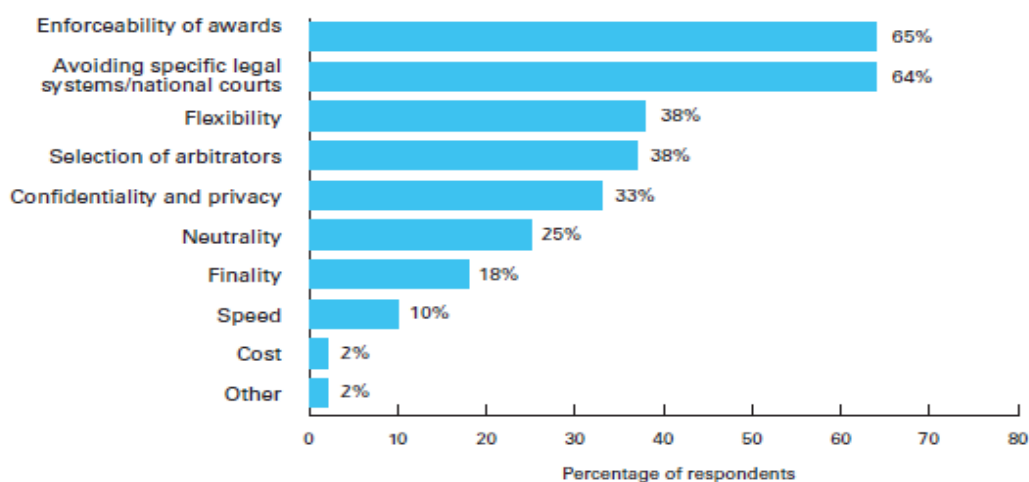
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<sup>25</sup> *ibid*, 44.

<sup>26</sup> *ibid*.

<sup>27</sup> *ibid*, 52.

**Figure 5: The most valuable characteristics of international arbitration<sup>28</sup>**



On the other side of the survey, the worst characteristics of arbitration are “cost” (the most complained about characteristic), “lack of effective sanctions during the arbitral process”, “lack of insight into arbitrators’ efficiency” and “lack of speed”.<sup>29</sup> Despite the majority of arbitration characteristics regarded as satisfactory, participants appear to address issues of how to improve arbitration mostly with concerns related to cost and speed of arbitrating. In the survey, there is an open question: “if you could have any improvement made to global arbitration, what would it be?” Issues raised are “procedural innovations to control time and cost”, “publication of awards”, “feedback mechanism on arbitrators” and “due process paranoia”.<sup>30</sup> The due process paranoia took special attention and is “a perceived reluctance by tribunals to act decisively in certain situations for fear of the award being challenged on the basis of a party not having had the chance to present its case fully”.<sup>31</sup>

<sup>28</sup> The School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London and White & Case LLP, ‘The International Arbitration Survey on Improvements and Innovations in International Arbitration’ (2015) 6 < <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> > accessed 14 December 2015

<sup>29</sup> *ibid*, 7.

<sup>30</sup> *Ibid*, 10.

<sup>31</sup> *ibid*, 10.

In sum, what arbitration brings and what participants expect is another form of litigation but not an alternative to litigation, which responds requirements of global commerce and avoids pitfalls of the national court's systems.

### **3.2 Arbitration Clause**

Arbitration clause is the essential ingredient for progression of arbitration proceedings and is called the “miracle clause” that will solve possible problems that may arise at a further stage of commercial relations. In order to remove and minimise complications and delays with respect to arbitral proceedings and the enforcement of arbitral awards, a well-drafted arbitration clause is crucial to associate in commercial contracts. Parties could choose incorporating standard contract terms in their contracts rather than drafting and negotiating a complete set of arbitration rules. However, each commercial contract has its own dynamics and idiosyncrasies requiring customised clauses rather than adopting the entire basket of standard terms in order to remove possible difficulties that arise after signing a contract. To determine priorities of contracts is essential to formulate arbitral clauses because all-purpose clauses are in fact not suitable for all situations. For example; if an award based on payment of interest is executed in certain countries like Saudi Arabia, the mention of interest may render the whole arbitration clause and award void. In the University of Missouri-Columbia's Contracting and Organization Research Institute' database based in joint venture agreements between 1993 and 1996, almost 90% (15 of 17 joint venture contracts) contained an arbitration clause.<sup>32</sup> In addition, in the Central Inquiry of 202 positive responses that recognize awareness of the LM, 85 percent of those positive responses contained arbitration clause in their contracts.<sup>33</sup> The more efficient the arbitral clause is determined, the less likely it will ever be utilised.

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<sup>32</sup> Drahozal and Naimark (n 17), 59.

<sup>33</sup> Luke Nottage, 'Practical and Theoretical Implications of the Lex Mercatoria for Japan: Central's Empirical Study on the Use of Transnational Law' (2000) 4(2) Vindobona Journal of International Commercial Law and Arbitration < [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=880388](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=880388) > accessed 5 January 2016.

Oral agreement on arbitral clauses is worthless. According to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, an arbitration clause must be written. Besides, effective arbitration clauses must be clear and evident in order to prevent ambiguities and complications.

### 3.2.1 Factors of Arbitration Clause

#### 3.2.1.1 Ad hoc or Institutional Arbitration

It is a fundamental choice affecting components of arbitration clause that parties must take this decision at the first beginning of contract formation as differences between the ad hoc and institutional arbitration was evaluated above at the methods of arbitration. The institutional arbitration that has obtained an arbitration infrastructure tested by over many cases with experienced professional appear more advantageous over the ad hoc arbitration.

#### 3.2.1.2 Typical Arbitration Clause

Every arbitration institution has its own model arbitration clause promoted by a chosen institution unless it is stated otherwise by the parties. Here is the ICC's and LCIA's model clause as a sample:

“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules”.<sup>34</sup>

London Court of International Arbitration (LCIA) composed its model clause as:

“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by

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<sup>34</sup> International Chamber of Commerce, ‘Standard ICC Arbitration Clause’ < <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/standard-icc-arbitration-clauses/> > accessed 2 January 2016.



arbitration under the LCIA Rules, which rules are deemed to be incorporated by reference into this clause”.<sup>35</sup>

Model clauses intended to generate workable and effective agreement to arbitrate. If parties wish to add factors to it, an arbitration clause could be amended with provisions that may be applicable law, language of arbitration and place of arbitration.

### 3.2.1.3 Place of Arbitration

The place of arbitration impacts on arbitration proceedings in various ways: the degree of the involvement of national courts in the arbitration proceedings; the potential to enforce the arbitral awards; extent and nature of mandatory procedural rules. For instance; arbitrators must be Muslim and male in Saudi Arabia. The place of arbitration is one of the most often added factors as well as clause of applicable law in ICC arbitration.<sup>36</sup> According to the 2015 International Arbitration Survey, the most widely preferred seats in order of importance are London, Paris, Hong Kong, Singapore and Geneva. The reasons underlying parties’ preference for the certain arbitration places are based on the appraisal of their legal infrastructure: the neutrality and impartiality of legal system; national arbitration law; its track record for enforcing agreements to arbitrate and arbitral awards; and the availability of quality arbitrators who are familiar with the seat.<sup>37</sup> According to cases commenced in ICC, and 2013, 88.5% of the cases appointed the place of arbitration that were seated in 104 different cities in 63 countries.<sup>38</sup>

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<sup>35</sup> London Court of International Arbitration, ‘Recommended Clauses’ (2015) <[http://www.lcia.org/dispute\\_resolution\\_services/lcia\\_recommended\\_clauses.aspx](http://www.lcia.org/dispute_resolution_services/lcia_recommended_clauses.aspx)> accessed 2 January 2016.

<sup>36</sup> Christopher R Drahozal and Richard W. Naimark (ed), *Towards a Science of International Arbitration* (Kluwer Law International 2005).

<sup>37</sup> The School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London and White & Case LLP, ‘The International Arbitration Survey on Improvements and Innovations in International Arbitration’ (2015) 14 <<http://www.arbitration.qmul.ac.uk/docs/164761.pdf>> accessed 14 December 2015

<sup>38</sup> ICC, ‘2013 Statistical Report’ (2014) 25(1) ICC Int Court of Arbitration Bulletin.

#### 3.2.1.4 Applicable Law

Applicable law clause is one of the crucial factors for why parties choose arbitration. Applicable law clause presents a chance for parties to determine substantive issues of their commercial relationship in case of dispute. Arbitration mechanism is more willing than national courts to respect parties' choice of applicable law by giving the larger control over rules of decisions. In particular, it is more practicable to appoint the best possible person experienced on applicable law chosen where an institution selects a chairman or sole arbitrator. The reasons why the applicable law clause is a crucial factor for parties are:

- It is preferred that the applicable law agreed upon is adequately advanced in regard to particular issues likely to emerge in any prospective dispute.
- Parties don't want to end up in an applicable law being applied by national law of another party.
- Parties may wish to exclude rules of conflict of laws causing complications and uncertainties as to applicable law.
- Arbitrators take into account rules and principles of global commerce when reaching in to arbitral awards.

Failure on choosing the applicable law may bring an unpleasant surprise to one or both of the parties as well as multiplying the time and cost of arbitration. For these reasons, the applicable law clause is the most often added factor in global commercial contracts, which is compatible with the findings of Stephan R. Bond' study called 'how to draft an arbitration clause'.<sup>39</sup>

#### 3.2.1.5 Composition of Arbitral Tribunal

Another important factor of arbitration clauses is the composition of arbitral tribunal, which reflects parties' confidence on arbitration tribunal by agreeing or deciding either upon an individual or a three-person tribunal, one of whom can be recommended by each party. A role

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<sup>39</sup> Drahozal and Naimark (n 36).

of the institutional arbitration for the formation of arbitral tribunals is inarguable as to comprise neutral and fair arbitral tribunal. By adding this clause on their contract, parties can decide on how many arbitrators they want to involve in the tribunal; how arbitrators should be selected; and what qualifications arbitrators should possess. For instance: “The sole arbitrator confirmed or appointed shall be a recognized legal expert in New York law with extensive experience in relation to the issues involved in the dispute and have full command of the German language”. However, there is no broad general clauses in this respect to cover all situations likely to arise.

#### 3.2.1.6 Language of Arbitration

Parties can put an arbitral clause of language that is going to be used throughout arbitration proceedings. A language in which a contract is written will automatically be assumed as the language of arbitration unless agreed otherwise by the parties. This is confirmed by ICC Rules, Article 20: “In the absence of an agreement by the parties, the arbitral tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract”.<sup>40</sup> Agreeing on the language of arbitration by parties is meaningful in order to avoid enormously expensive and time-consuming proceedings such as simultaneous interpretation at hearings and translation of all documents.

#### 3.2.1.7 Other Possible Factors

There could also be other clauses that would be put in contracts according to circumstances in which each commercial relationship requires parties to diminish the cost and time. Each commercial relationship designs its own clauses in their contract to facilitate eventual disputes likely to arise. Other possible clauses that could be put in commercial contracts are:

- Waiver of Appeal/Exclusion Agreement

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<sup>40</sup> International Chamber of Commerce, ‘ICC Rules of Arbitration’ (2012) < [http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article\\_20](http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article_20) > accessed 4 January 2016.

- The applicable procedural law
- Distribution of arbitration cost between parties
- Waiver of sovereign immunity

As a result, there is no all-purpose and miraculous arbitration clause that is convenient in every single case. Therefore, it is crucial to engage in an attentive analysis of circumstances related to a specific transaction in order to reach the best tailored arbitration clause.

#### **4 Applicable Law Clause and the Lex Mercatoria**

The applicable law clause is one of the prominent reasons preferred over litigation in national courts, rendering the legal framework that gives expression and substance to the will of parties under the contract. In the context of the applicable law clause, the legal framework of commercial arbitration enables applications of great variations of rules tailored to exigencies of a particular case; preferences and customs of participants; and generally accepted global commercial principles and practices. The reason behind this is the importance of freedom of contract, which parties customised their own contracts pursuant to needs of their commercial relationship. It should be noted that the parties' right for the freedom of contract is not unlimited. That will be detailed at the section of requirements of the global commercial order in chapter 6. The freedom of contract and arbitration present a critical link to analyse the development of the LM. Expanded party autonomy in global commercial transactions allows parties to enter into a broader range of contractual relations and flexible self-regulation by the global business community and then to determine their disputes by arbitration. Parties often attach the applicable law clause in their contracts for several reasons. Major reasons are: the ability of parties to choose arbitrator/arbitrators familiar with practices and technical aspects of the global commercial settings; the arbitration is well-suited to discerning configuration of the LM and applying its rules; and parties' relative autonomy from national legal systems which

arbitrators have non-national perspective and are more capable of considering global principles and practices of law.<sup>41</sup>

International treaties have a significant place either directly to widen parties' freedom of contract or indirectly to influence the regulation of national laws. In regard to the applicable law clause, parties can resort the substantive law applicable to their contracts based on non-national legal principles. The European Convention on International Commercial Arbitration in 1961 stated regarding the applicable law:

*"The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade usages."*<sup>42</sup>

The European Union's approach towards non-national legal principles is substantial and determinative as to consider its legal regulation for the LM as an applicable law because the EU is one of the biggest economic and political powers, especially given its influence area. In fact, the existence and practicality of the UNIDROIT Principles (The International Institute for the Unification of Private Law) and PECL (Principles of European Contract Law) strengthen the status of the non-national principles of law.

#### **4.1 The Primary Issue Dealt by This Research**

Parties attach the applicable law clause in their contracts to resolve any disputes that may arise in global commercial transactions. As Figure 6 demonstrates, there were well over 75 per cent

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<sup>41</sup> Bernardo M Cremades and Steven L Plehn, 'The New Lex Mercatoria and The Harmonization of The Laws of International Commercial Transactions' (1984) 2(3) The Boston University International Law Journal < [http://heinonline.org/HOL/Page?handle=hein.journals/builj2&div=24&g\\_sent=1&collection=journals#](http://heinonline.org/HOL/Page?handle=hein.journals/builj2&div=24&g_sent=1&collection=journals#) > accessed 7 January 2016.

<sup>42</sup> European Union, European Convention on International Commercial Arbitration 1961 < [https://www.trans-lex.org/501600/\\_european-convention-on-international-commercial-arbitration-of-1961-european-commission-for-europe/](https://www.trans-lex.org/501600/_european-convention-on-international-commercial-arbitration-of-1961-european-commission-for-europe/) > accessed 12 November 2015.

of contracts where parties specified applicable law during arbitration at the ICC, one of the biggest institutional arbitrations. Even this percentage has been higher in ICC's cases registered in 2013 where 90 per cent of the parties had included an applicable law clause in their contracts.<sup>43</sup>

**Figure 6: Percentage of Contracts in ICC Arbitrations Specifying Applicable law<sup>44</sup>**

1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
81.0	81.7	87	81.3	82.1	82	77	78	81.7	81.7

The prominent issue is what type of law is usually chosen in order to resolve disputes arising out of global commercial transactions. The concerned stakeholders directly or indirectly are contracting parties, arbitration institutions and national states. According to Appendix 2, a significant percentage of parties, around 80%, selected national laws as an applicable law to settle disputes that may arise in global commerce.

In the ICC's cases of 2013, 97% of those applicable law clauses specified a national law as the most popular national law in Figure 7. The applicable law choices covered laws of 90 different nations and independent territories.<sup>45</sup> In the remaining 3 per cent of contracts, the parties had chosen a-national rules and principles which are: four of those contracts referred to the United Nations Convention on Contracts for the International Sale of Goods (CISG), six to international law(s), two to the UNIDROIT Principles of International Commercial Contracts, one to amiable composition, one to European Union Law and one to the ICC's Incoterms rules.<sup>46</sup>

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<sup>43</sup> ICC (n 38).

<sup>44</sup> Drahozal and Naimark (n 36) 197, citing ICC Int'l Ct Arb Bulletin '1994 – 2003 Statistical Report'.

<sup>45</sup> ICC (n 38).

<sup>46</sup> *ibid.*

**Figure 7: Choice of Applicable Law in ICC's Cases of 2013<sup>47</sup>**

<b>Governing Law</b>	Number of clauses specifying this law as a percentage of total number of applicable law clauses in the parties contracts
English Law	15.64%
Swiss Law	10.09%
US Law	8.70%
French Law	7.69%
German Law	7.31%
Brazilian Law	4.67%
Spanish Law	3.28%
Austrian Law	2.77%
Greek Law	2.14%
Mexican Law	1.89%
Romanian Law	1.89%
Algerian Law	1.77%
Singaporean Law	1.77%
Italian Law	1.64%
Indian Law	1.39%

A crucial problem in this research is how justly national laws correspond to the needs of the realities of the global political economy within arbitration. What if international parties do not specify an applicable law in their contracts? In fact, they do not correspond, see Appendix 2. By choosing a national law as an applicable law provides the extraterritorial application of a national commercial law that is not formulated to the needs and requirements of other party's homeland. The reality is akin to applying a 'one-size fits all' solution, yet a person who wears a size 14 (global issue-global law) cannot fit into a size 8 (local issue-national law). This example simplifies the main problem that this thesis deals with - the dilemma between global law (global issue) and national law (local issue). Therefore, determining the role of the LM is essential to the restructuring of global political economy taking place through deeper transformations in local and global political and economic relations by forming juridical foundations.

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<sup>47</sup> ICC, 2013 Statistical Report (2014) 25(1) ICC Int Court of Arbitration Bulletin.

In the context of globalisation, dominance of national laws and private international law as conflict of laws do not provide the simplicity and the accuracy needed by the global commercial community. To consider both systems; national law and international law are the products of legal positivism taking national states in the centre of theories of law would not be an answer to regulate global issues like global commerce.

Firstly, the localisation of global commercial transactions within a particular national system is not an easy decision to make between parties because the majority of the global commercial contracts acquire affiliations of equal importance with several national legal orders. Moreover, to decide on the applicable law would be more difficult for contracting parties coming from different countries and legal traditions due to each party's preference for their own national laws. It may get more complicated to locate global commercial transactions within physical territory of a state for electronic commerce that is an immaterial marketplace and plays a central role in contemporary global trade.

Secondly, private international law provides rules deciding which national law is to be implemented to resolve disputes between parties from different countries. Rules of private international law system do not take a different approach than national law system, exploring the applicable law within traditional theories of law taking state-centric approach to resolve disputes. As a result, by ending up choosing national law as an applicable law does not really supply a solution for regulation of global issues along with complex and uncertain nature of private international law. The disjuncture between commercial practices and commercial law is caused by the public/private distinction because private international law functions more like public international law and less like conflicts of laws.

Finally, the national law formulated to regulate specific domestic transaction does not take into consideration the demands of global commerce. Global trade ensuing out of global interactions between parties having different legal and cultural background engenders the global



commercial law which possess dissimilar dynamics and characteristics than any national framework. What if an applicable law, national law, chosen by parties does not supply any response to particular transactions through which parties face with disputes? For example; Euro-bond that is more closely connected to global issues than to a single state and transacts in global exchange market. Euro-bond is not subject to taxes and regulations of any one governments.<sup>48</sup>

Hence, global trade emerges within a numerous of national legal systems. Each national system mirrors a unique set of historical, cultural and economic circumstances, which result in regulatory variation and contradiction thereby discouraging the growth of global trade. However, these difficulties can be eliminated by developing a consistent global legal framework. There are many cases allowing to resort to the global commercial law either if the parties choose or in the absence of choice of the applicable law clause, which rules of arbitral institutions and international conventions or commissions for global trade come to the forefront e.g. ICC Arbitration rules, article 21; UNCITRAL Arbitration rules, article 35; or the 1961 European Convention on International Commercial Arbitration, article VII.

On the other hand, the existence of the global business law has an increasing importance in the context of globalism as the integration of world economies and financial interdependency of national economies has been augmented. Global trade expanding national boundaries must engender a body of law. “Nations as well as men are becoming ever more dependent on one other for the common needs of daily life. The logic of this movement towards one world is one law in those areas wherein uniformity is necessary and convenient”.<sup>49</sup>

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<sup>48</sup> BBC, ‘Q&A: Bonds, project bonds and eurobonds’ (2012) < <http://www.bbc.co.uk/news/business-11743952> > accessed 10 January 2016.

<sup>49</sup> Louise Hertwig Hayes, ‘Modern Lex Mercatoria: Political Rhetoric or Substantive Progress’ (1977) 3(2) Brooklyn Journal of International Law <[http://heinonline.org/HOL/Page?handle=hein.journals/bjil3&div=17&g\\_sent=1&collection=journals#](http://heinonline.org/HOL/Page?handle=hein.journals/bjil3&div=17&g_sent=1&collection=journals#)> accessed 11 January 2016, citing Graveson ‘Foreword to International Association of Legal Science’.

Despite wide differences among national legal systems, participants engaging in global trade have developed a high degree of uniformity and common understanding in commercial practices, thereby governing disputes by similar legal rules throughout the world. Accordingly, global commercial instruments have been evolved and recognised as common commercial needs shared by all who participate in global commercial transactions. These instruments are established and adopted globally and ubiquitously e.g. CIF terms (cost, insurance, freight), FOB (free on the board) and CIP (carriage and insurance paid to). A variety of the business instruments decide who shall undertake the risks of negligence and transport etc. Thus, the LM regulating global commercial transactions is an essential global body of law, established upon the business understanding and experiences of the global merchant community.

The global merchant community generated and has been developing the LM through commercial practices, understandings, regulations and arbitration tribunals to which disputes are submitted. In particular, the role of arbitration for development of the LM cannot be ignored because arbitrators usually and freely apply the LM as the basis of their awards. However, the opponent view alleges that the LM has a synthetic concept embracing similarities among various national legal systems, which rest on the traditional theory of law that any contract not made between states in their public capacity as subjects of international law must be attributed to national law. In fact, however the LM is itself much older than the system of nation-states, which has had a more or less continuous history since the Medieval Age. Although it has been argued that the LM is an entirely different entity from its medieval predecessor, it seems more accurate to say that the medieval LM from the eleventh to the sixteenth century never died but endured to evolve, even in the heyday of nationalism, as part of the *Ius Gentium*.<sup>50</sup>

Moreover, the sources of the LM is not based upon a comparative law system but actual practice of interaction of the global merchant community which makes trade usages and customs one of the LM's primary sources. If customary nature of the global commercial law

were sufficiently well understood and universal, there would be no need for global codification. In fact, the need and requirement of global codification of the commercial law has been eagerly required since the end of the nineteenth century.<sup>50</sup> As a result, the picture of global commerce demonstrates the essential nature of the global commercial law.

## **5 Actual Resort to the LM in the Contemporary Commercial Practice**

The significance of the actual resort to the LM in the contemporary commercial practices is very substantial to draw any conclusion as to the practicality and awareness of the LM being used during the arbitral proceedings. This section deals with the basic question of whether, how and to what extent the LM can be used in everyday legal practices within arbitration. In order to investigate the answers to these questions, approaches of contractual parties and arbitral institutions to the LM are determinative, which render assessment of two different side's approaches: Arbitral institutions (external and supplier) and Contracting parties (internal and demanding).

### **5.1 Arbitral Institutions' Approach to the LM**

Arbitral institutions play an essential role within the framework of the global dispute resolution mechanism. Parties rendering their disputes to an arbitral institution alter the decision making power from arbitrator to the arbitral institution because the arbitration institutions don't serve purely for administrative functions. They constitute an autonomous judicial system which acknowledges the LM as a global commercial law and steers the direction of developments in arbitration. Therefore, arbitral institutions are important to discover the answers to how and to what extent the LM can be used in everyday legal practice. In order to find out these answers, there are two main parameters that help the evaluations of this analysis, which are the arbitral institutions' rules and arbitration awards.

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<sup>50</sup> *ibid.*

With regards to how arbitration institutions' applicable law rules approaches the LM, trade usage is the prominent provision that maintains a link to the LM to apply in arbitration mechanism. As mentioned in Chapter 2 when discussing the sources of the LM, trade usage is an important connection between the LM and global disputes. Therefore, it is crucial how the rules of arbitration institutions are arranged with regard to trade usage to keep that connection applicable and justifiable. According to Appendix 3 that listed leading forty-four arbitral institutions, thirty-two arbitration institutions apply trade usages relevant to the disputes. The remaining twelve institutions do not take into consideration trade usages automatically unless parties state otherwise on the contracts. When Appendix one and three are analysed together, reaching the outcome that the majority of the leading arbitrations consider trade usages is inevitable. In addition, the arbitral institutions' rules that do not consider trade usages in the process of dispute settlement mechanism can be obliged to apply trade usages through the UNCITRAL Arbitration Rules influential globally.

However, the trade usage is not the only instrument providing a link to the application of the LM for global disputes. Arbitration institutions render arbitrators to apply the LM by means of clauses placed in applicable law clauses of contracts, which can be called general principles of the global commercial law, *amiable compositeur*, *ex aequo et bono* etc. As mentioned in the sources of the LM, the general principles of the global commercial law are a preferred term as a main heading to cover and refer to another terms such as good faith, *pacta sunt servanda*, equity and force majeure, which is compatible with the findings of the Central Enquiry in question and a practical solution. Hence, the general principles of the global commercial law are a chosen term in favour of the LM in this thesis in order to prevent confusions on the scope of terminologies placed in global contracts. When arbitrators require consideration of the

general principles of global law, it shall be generally understood that arbitrators consider legal principles and practices applied as a hallmark of global commerce.

As for arbitration awards, arbitration institutions have an irreplaceable place that possess an opportunity to access prior arbitration awards because arbitration awards are crucial empirical evidence indicating that the LM is considered and utilised by arbitrators to render their decisions. The development of the LM requires revealing legal grounds in arbitration awards so as to access binding precedents for guidance. But, arbitration awards are not publicly available due to confidentiality. The confidentiality of arbitration awards impedes the development of the LM on the basis of the lack of case studies, which also causes an issue of predictability of arbitration awards. In order to ensure a uniform and consistent interpretation of custom and practice, arbitration institutions have an important role to render stare decisis in arbitrations awards through informing their own arbitrators to do so. The ICC is distinct from other arbitral institution as they publish some of their awards. The ICC published a 110 arbitral awards including interim and partial awards from 1983 to 2002, fifteen of whose awards relied on global commercial law in making the awards. Yves Derains, the ex-secretary General of the ICC Court of Arbitration, explained in describing those awards:<sup>51</sup>

- Only those awards in which arbitrators have felt least constrained to apply national laws are published.
- No awards are published without permission of the parties to the dispute. When permission is granted, these parties determine the extent of editing to be done.
- The ICC has neither the power nor desire to impose an obligation on arbitrators to look to prior awards in rendering their decisions.
- ICC Arbitrators are generally unaware of the content of prior arbitration awards.

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<sup>51</sup>Bernardo M Cremades and Steven L Plehn, 'The New Lex Mercatoria and The Harmonization of The Laws of International Commercial Transactions' (1984) 2(3) The Boston University International Law Journal <[http://heinonline.org/HOL/Page?handle=hein.journals/builj2&div=24&g\\_sent=1&collection=journals#](http://heinonline.org/HOL/Page?handle=hein.journals/builj2&div=24&g_sent=1&collection=journals#)> accessed 7 January 2016.

Hence, published awards of the ICC are not representative of all ICC awards so that extrapolating from published awards to all ICC awards is inappropriate. In 2015 the International Arbitration Survey<sup>FF</sup>, asked the participants, “What could arbitral institutions do to improve international arbitration?” The second most popular answer was to “publish awards in a redacted form and/or as summaries” by virtue of the fact that arbitration institutions are in the best position to provide the necessary information for binding precedents.<sup>52</sup> As a result, it is not easy to make a statement of how and to what extent arbitrators relies on LM in their awards.

#### 5.1.1 Prominent Arbitration Institutions

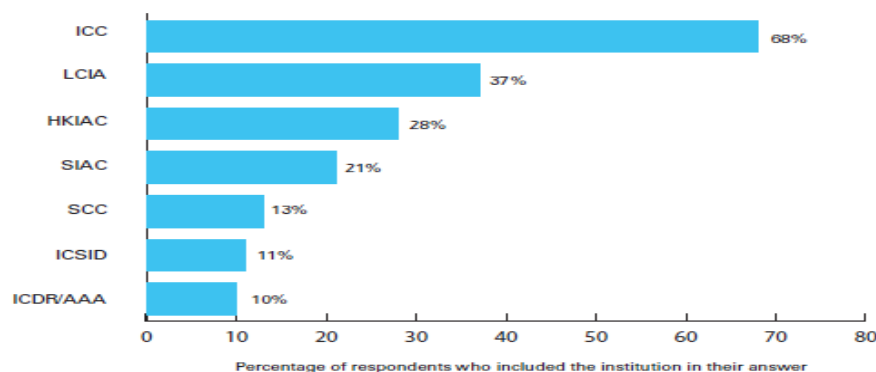
The main indicating factor for determining outstanding arbitral institutions is caseload. According to the Appendix 1, ICC, The China International Economic and Trade Arbitration (CIETAC), The American Arbitration Association (AAA), The Hong Kong International Arbitration Centre (HKIAC) and The London Court of International Arbitration (LCIA) are prominent arbitration institutions. However, an analysis based in the caseload as to deciding prominent arbitration institutions should be read and interpreted with great caution. For example, some of the arbitral institutions register for the appointment of an arbitrator as a case or domestic and global arbitration cases are registered together without making a distinction between them. Hence, results of the 2015 International Arbitration Survey are also analysed to reach more reliable data in order to identify prominent arbitration institutions. As it is seen in Figure 8, the five most preferred arbitral institutions are the ICC, LCIA, HKIAC, The Singapore International Arbitration Centre (SIAC) and The Stockholm Chamber of Commerce

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<sup>52</sup> The School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London and White & Case LLP, ‘The International Arbitration Survey on Improvements and Innovations in International Arbitration’ (2015) 23 < <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> > accessed 14 December 2015

(SCC). The ICC and LCIA were ranked as the leading arbitration organisations of the last 10 years which is compatible with the findings of the 2006 and 2010 surveys taken by the same operators like the 2015 survey. The reason for the dominant position of the ICC is stressed in the survey; globalism of the ICC offers high quality services in most jurisdictions.<sup>53</sup>

**Figure 8: What are your and your organizations' three preferred arbitral institutions?<sup>54</sup>**



In the 2015 survey, the two top considerations for why certain institutions were selected by the respondents were “reputation and recognition” and “previous experience of the institutions”. A striking difference between the 2015 International Arbitration survey and Appendix 1 is that the CIETAC was not chosen in the survey as opposed to Appendix 1. A substantial reason behind this is that the CIETAC is not accepted well globally due to not being in use among non-Chinese parties.<sup>55</sup>

#### 5.1.1.1 The International Chamber of Commerce

The International Chamber of Commerce (ICC) is the global business organisation whose purpose is to assertively represent global business aspects. The ICC was established in 1919 with a broad spectrum of goals from advancing trade and investment to fighting corruption, combating commercial crime and arbitration. The ICC is the leading, most influential and

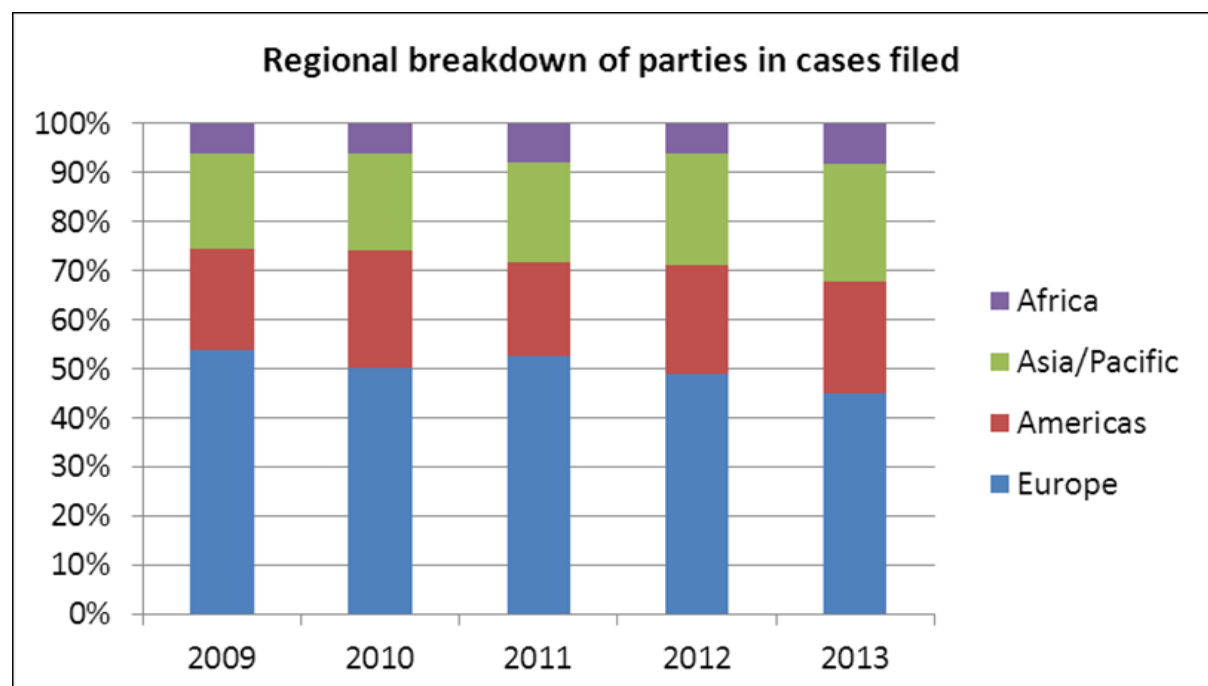
<sup>53</sup> *ibid* 17.

<sup>54</sup> *ibid*.

<sup>55</sup> Christopher R Drahozal and Richard W. Naimark (ed), *Towards a Science of International Arbitration* (Kluwer Law International 2005) 237, citing James H Cater ‘International Commercial Dispute Resolution’ (1996).

experienced global dispute resolution provider. The ICC Commission on Arbitration forms a forum to impact new policies and practical issues of global business disputes. The ICC's dispute resolution services had 863 new cases, 92% arbitration cases, involving almost 2,400 parties from 141 countries and independent territories throughout 2014.<sup>56</sup> The ICC has also established its own Court of Arbitration over the last 90 years. The ICC International Court of Arbitration is a unique body of global dispute resolution specialists who oversee arbitration proceedings and takes major administrative decisions. As confirmed in Figure 9, the range of nationalities of parties and arbitrators has expanded by respectively 20% and 30% in the last ten years through opening offices in Hong Kong and New York, approving users' confidence in the Court's capacity to handle disputes in different cultures and legal traditions. The arbitrators appointed and confirmed in 2013 came from 86 countries worldwide.<sup>57</sup>

**Figure 9 : The ICC Regional Breakdown of Parties in cases filed<sup>58</sup>**



<sup>56</sup> ICC, '2014 ICC Dispute Resolutions Statistics' (2015) < <http://store.iccwbo.org/content/uploaded/pdf/2015-1%202014%20Statistics%20abstract.pdf> > accessed 21 December 2015.

<sup>57</sup> ICC, *2013 Statistical Report* (2014) 25(1) ICC Int Court of Arbitration Bulletin.

<sup>58</sup> ICC, 'ICC Court further extends worldwide reach in 2013' (2014) < <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Articles/2014/ICC-Court-further-extends-worldwide-reach-in-2013/> > accessed 10 January 2015.



Disputes value of which was equally varied from less than \$50,000 to over \$1 billion were submitted to ICC in 2013 from a wide range of economic sectors. The prominent economic sectors in 2013 are the construction and engineering, energy, finance and insurance.<sup>59</sup>

The ICC Rules of Arbitration arranged “Applicable Rules of Law” in Article 21 in force from January, 2012. The Article 21 is:<sup>60</sup>

- 1- The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.*
- 2- The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.*
- 3- The arbitral tribunal shall assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties have agreed to give it such powers.*

In this provision, the process of arbitration is strangled by legal technicalities and strict constructions. Arbitral tribunals do not have the broad authority to practice the general legal principles of global commerce such as good faith, ex aequo et bono etc. because these principles have open end definitions. Parties do not risk their stake through being implemented with these principles whereas under the first clause of Article 21, arbitral tribunals can decide on applicable law if parties don’t determine it. This seems a dilemma in terms of relying on arbitral tribunals using judicial discretion. Perceiving or assuming general legal principles of global commerce as potential risk on their legal stakes is insignificant adhering tightly strictness of contracts.

The major goal of the ICC is to assist in unification and the harmonisation of rules of global trade, which affirms and shares the ideology underlying the LM. Thus, the ICC has established

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<sup>59</sup> ICC (n 57).

<sup>60</sup> ICC, ‘ICC Rules of Arbitration’ (2012) < [http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article\\_21](http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article_21) > accessed 10 January 2016.

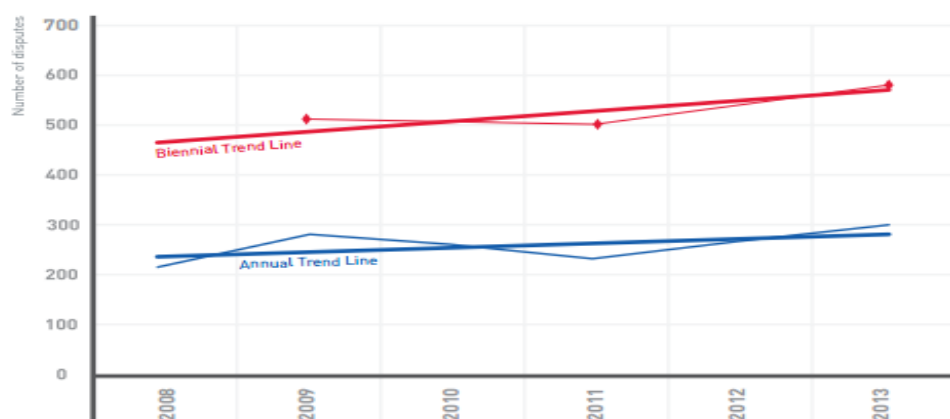
uniform rules and standard contract terms that are used extensively in contracts of the global business community. These are the rules and standards globally forged by the ICC: Uniform Customs and Practice for Documentary Credits (UCP 600) and Incoterms (international trade definitions).

More importantly, the ICC created Task Force on jurisdiction and applicable law in 2010, focusing on the concept of the LM in order to update the global business community and lawyers dealing with global commerce. The Task Force's main purpose is to enable better understanding of the LM especially when there is a genuine need for a set of principles that avoids a particular national law.<sup>61</sup> Therefore, the ICC is the prominent arbitral institution for this thesis to determine the role and significant of the LM in global trade.

#### 5.1.1.2 The London Court of International Arbitration (LCIA)

The LCIA is one of the world's leading arbitration institutions for global dispute resolution. In 2013, the LCIA received 301 requests for new cases filed, 290 requests of which were referred to arbitration services of the LCIA as the curve of new application is seen in the Figure 10.

**Figure 10: The Number of Cases Filed 2008-2013<sup>62</sup>**

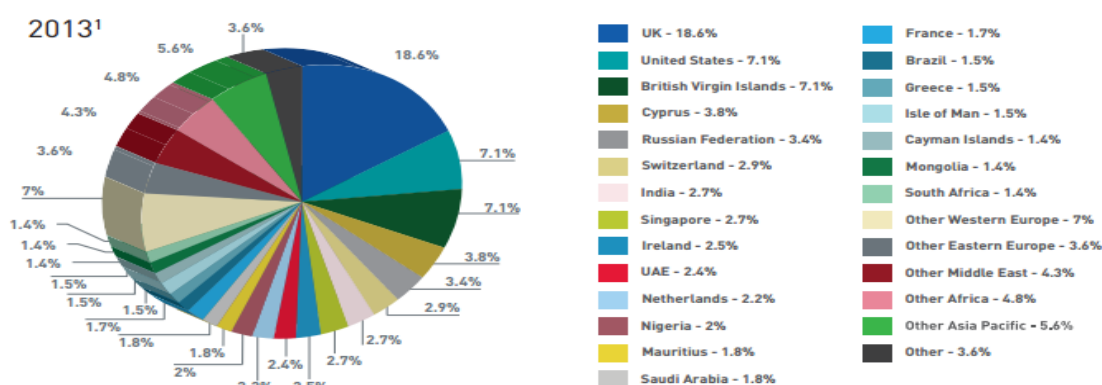


<sup>61</sup> ICC, 'Task Force on Jurisdiction and Applicable Law' (2010) < <http://www.iccwbo.org/about-icc/policy-commissions/commercial-law-and-practice/task-force-on-jurisdiction-and-applicable-law/>> accessed 6 January 2016.

<sup>62</sup> LCIA, '2013 Registrar's Report' < <http://www.lcia.org/LCIA/reports.aspx>> accessed 12 January 2016.

The global nature of the LCIA's services is reflected that over 80% of parties are not of English nationality.<sup>63</sup> This is confirmed by geographical diversity of parties applied to arbitration services of the LCIA as a global arbitration institution according to Figure 11.

**Figure 11: The Profile of the Parties Applied to the LCIA in 2013<sup>64</sup>**



The LCIA arbitration rules are universally applicable that offer a combination of attributes of civil and common law orders. The LCIA 2014 Arbitration rules arranged the regulation of applicable law clause in Article 22.3 and 22.4, which are respectively:<sup>65</sup>

- The Arbitral Tribunal shall decide the parties' dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Arbitral Tribunal decides that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate.*

<sup>63</sup> LCIA, 'Introduction' (2015) < <http://www.lcia.org/LCIA/introduction.aspx> > accessed 12 January 2016.

<sup>64</sup> LCIA (n 62).

<sup>65</sup> LCIA, 'Arbitration Rules 2014' (2014) < [http://www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2014.aspx#Article 22](http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article%2022) > accessed 13 January 2016.

- *The Arbitral Tribunal shall only apply to the merits of the dispute principles deriving from "ex aequo et bono", "amiable composition" or "honourable engagement" where the parties have so agreed in writing.*

As mentioned above the LCIA does not automatically consider trade usages unless parties state otherwise in contract.

#### 5.1.1.3 Hong Kong International Arbitration Centre (HKIAC)

The HKIAC is the most prominent institution in Asia and the preferred seat across the world for global dispute resolution. Hong Kong is ranked fifth worldwide and first in Asia in the index of judicial independence issued in the World Economic Forum's 'Global Competitiveness Report 2014-2015'.<sup>66</sup> The HKIAC is an independent, non-profitable organisation and plays a leading role in developing innovative arbitration practices. The HKIAC won the 2014 Global Arbitration Review on innovation for its model arbitration clauses and tribunal secretary service.<sup>67</sup>

The HKIAC 2013 Arbitration Rules regulates applicable law in Article 35.<sup>68</sup>

- *The arbitral tribunal shall decide the substance of the dispute in accordance with the rules of law agreed upon by the parties. Any designation of the law or legal system of a given jurisdiction shall be construed, unless otherwise expressed, as directly referring to the substantive law of that jurisdiction and not to its conflict of laws rules. Failing such designation by the parties, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.*

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<sup>66</sup> HKIAC, 'Why Arbitrate in Hong Kong' (2015) < <http://www.hkiac.org/en/arbitration/why-hong-kong> > accessed 15 January 2016.

<sup>67</sup> Law Business Research, 'Global Arbitration Review 2014' (2015) < <http://globalarbitrationreview.com/news/article/33370/vote-gar-awards/> > accessed 15 January 2016.

<sup>68</sup> HKIAC, 'Administered Arbitration Rules' (2013) < <http://www.hkiac.org/en/arbitration/arbitration-rules-guidelines/hkiac-administered-arbitration-rules-2013/10-domain-name-dispute-resolution-a-odr/14-hong-kong-international-arbitration-centre-administered-arbitration-rules-2013-3#35> > accessed 16 January 2016.

- *The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly agreed that the arbitral tribunal should do so.*
- *In all cases, the arbitral tribunal shall decide the case in accordance with the terms of the relevant contract(s) and may take into account the usages of the trade applicable to the transaction(s).*

## **5.2 Concerned Parties' Approach to the LM**

The critical assessment of contracting parties' approach to the LM is crucial and fundamental to determine the existence and viability of the LM. Their approach will be indicative of how the parties consider the LM as an applicable law or supplementing and interpreting a national law chosen within arbitration since the very beginning of their commercial relationship. To establish the parties' assessment and practice on the LM would pose few difficulties. The major difficulty is the empirical adequacy required in order to make a general statement and conclusion of the parties' approach or to discover what stops the parties to not to choose the LM. It is easy to find individual cases in which the LM is resorted to resolve disputes but the main hurdle of it is whether or not each individual case reflects to general approach and perception of the global commercial community towards the LM.

There is limited published data on arbitration due to confidentiality. This leads to discussions regarding the LM with regard to its viability and use being characterised by misunderstandings and irreconcilable viewpoints. These are largely based on assumptions which have no empirical basis. It hinders debate as the analysis of the LM needs an empirical assessment to the realities of global commerce. The empirical evaluation is not just for practical usefulness but also for the theoretical viability. The theoretical viability must be supported by empirical evidence rather than postulating a phenomenon that fits into their theories so well. Empirical studies also challenge individual expectations and perceptions, indicating a transition from anecdotal to

empirical findings as some of the heated discussions on arbitral issues do not include wider perspective. This is possibly a sign that the arbitral community is concerned with macro configuration but would welcome micro regulation.<sup>69</sup> Therefore, an adequate theory of the LM cannot only count on theoretical possibilities but also on empirical findings. This research benefits from the available up to date empirical studies to demonstrate the existence and viability of the LM in order to provide the empirical adequacy.

#### 5.2.1 The Existed Surveys on the Use of the LM in Legal Practice

There are four surveys so far that have been conducted to verify the application of the LM in global legal practice, being aware of that undertaking a survey at global scale is not easily manageable especially with time and cost wise. These surveys are the Selden Enquiry, the UNIDROIT Enquiry, the Gordon Enquiry and the Central Enquiry.

##### 5.2.1.1 The Selden Survey

The survey was made in 1995 among 23 practitioners from ten countries on the use of the LM.<sup>70</sup> Most respondents answered that they would strongly advice against a choice of the LM as an applicable law into global contracts in favour of definitive and provable law.<sup>71</sup> However, considering the scale of the survey, it cannot supply credible data as to the application of global commercial law.

##### 5.2.1.2 The UNIDROIT Survey

The UNIDROIT conducted the survey in 1996 among 1000 participants of its Principles, gathering data as to different ways in which the UNIDROIT Principles had been practised. The outcome of the survey confirmed the practical advantage and intrinsic quality of the Principles

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<sup>69</sup> The School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London and White & Case LLP (n 52).

<sup>70</sup> Luke Nottage, 'Practical and Theoretical Implications of the Lex Mercatoria for Japan: Central's Empirical Study on the Use of Transnational Law' (2000) 4(2) Vindobona Journal of International Commercial Law and Arbitration < [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=880388](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=880388) > accessed 5 January 2016.

<sup>71</sup> Christopher R Drahozal and Richard W. Naimark (ed), *Towards a Science of International Arbitration* (Kluwer Law International 2005) 209.

although the Principles were taken by the survey as pre-statements of global commercial law without codifying this legal system.<sup>72</sup>

#### 5.2.1.3 The Gordon Survey

The survey was conducted in 1997 among law faculties, practitioners and judges in Florida on the applicability of the CISG and UNIDROIT Principles. The outcome of the survey was that there was small awareness and comprehension of the CISG and UNIDROIT Principles.<sup>73</sup> This result is significant because it suggested that lack of information contributes to the unwillingness of practitioners to adopt and apply global commercial law instruments.<sup>74</sup> The Gordon Survey is also based on a small scale and then raises question regarding the reliability of the survey.

#### 5.2.1.4 The Central Survey

The Central survey was, the first and foremost intriguing empirical study, completed in 2000 by Professor Klaus Peter Berger and his team at the Centre for Transnational Law (Central) at the University of Muenster, Germany. The Central survey was the core part of a three year research project that is entitled “The Role of Merchants, their Lawyers and their Arbitral Tribunals in the Evolution and Development of Transnational Commercial Law”.<sup>75</sup> It investigated globally current practices and perceptions in the arbitration and commercial contracts in relation to the LM or what the Central survey refer to as “Transnational Law”. If it is not necessarily or structurally required, this thesis prefers to call the LM the global commercial law instead of transnational business law in order to render the integrity of the terminology between chapters. The Central survey fills a major gap in obtaining reliable empirical data on the usage and perceptions of LM, which covers the whole range of global legal practice from contract negotiation to the arbitration. The Central research team surveyed

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<sup>72</sup> *ibid* 209.

<sup>73</sup> Nottage (n 70).

<sup>74</sup> Drahozal and Naimark (n 71) 210.

<sup>75</sup> *ibid*, 211.

a broad sample such as arbitrators, attorneys, and in house counsel, and received answers from a total of 51 different countries. The team obtained 639 usable responses, a response rate of 23.4%.<sup>76</sup> Therefore, the Central survey provides more reliable empirical data on the use of the LM in commercial contract negotiation, contract drafting and arbitration.

The Central research project pursued two aims that address two hotly debated issues dealing with rules of how to render arbitral awards. The Central survey was aimed to explain whether the conduct of global commerce is determined by global commercial law within arbitration. The first aim requires to determine whether common business practices such as good faith, *pacta sunt servanda* or equity are being concerned by the global business community to reach the mutual adherence that has led to the information of global commercial law. This has already been analysed in chapter 2 under the sources of the LM, referring to the findings of the Central survey in question.

The second aim is which parties can and do choose global commercial law as an applicable law in arbitration instead of national law to govern their contracts. As mentioned earlier that the Central survey accepted the LM as transnational business law, the viability of the transnational business law was designed as a third legal system. The third legal system, known as Private International Law, is an independent, supranational, apolitical and autonomous legal system between domestic law (first legal system) and Public International Law (second legal system). This thesis objects this hypothesis taking the LM as the third legal system by the Central research team on two grounds.

The first objection is on the ground of distinction between the public and private sphere that the third legal system approves. The distinction is not reflective of an organic, natural or inevitable separation and induces the disjuncture between commercial practices and

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<sup>76</sup> *ibid*, 218.



commercial law. As the aspects being against the distinction has already been mentioned at related sections, it is just more preferable to refer that in order to avoid unnecessary repetition. The second objection is that the Central study's definition and concept of the LM as the third legal system, also known as transnational business law, satisfies all elements of existing and classical theories of law. That is to say, the Central study does not distinguish between global issues and local issues to regulate whereas differences in essence between global issues and local issues such as dissimilar value systems, characteristics and dynamics prompt a requirement of a legal framework for global issues. Hence, regulating global issues within the same legal framework as that of local issues is inadequate and does not fit into traditional theories of law. In order to regulate global issues within an exclusive legal framework, the LM regulating global commercial issues as the global commercial law may be usefully regarded as both a constitutive element of global business order and an attribute of the global legal order for other global issues. Therefore, it is essential to demonstrate the requirements of a new and unifying theory of global law paradigm that influences theories of international relations and must be capable of explaining the role of the LM as a global merchant order in the global political economy.

Besides, some caveats must be considered when analysing the results of the Central survey despite it being the most complete survey to date on the use of the LM. The survey did not ask participants for the percentage of cases or arbitration matters in their practice in which global commercial law was used, thereby denying the percentages to be calculated in the total number of cases.<sup>77</sup> The survey's results were also not enough to establish correlations between specific type of transaction on the use of the LM because the Central study covers a broad range of transactions e.g. sales contracts, joint ventures, distribution and licensing contracts.<sup>78</sup>

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<sup>77</sup> Drahozal and Naimark (n 71) 220.

<sup>78</sup> *ibid.*

#### 5.2.1.4.1 The Central Survey's Empirical Findings

It is significant to start the analysis of the findings of the Central's survey with the respondents' references to global commercial law because there is no settled definition and concept of the LM in the legal doctrine. "General Principles of Law" was the most often used terminology by 183 respondents (28.64%).<sup>79</sup> "Lex Mercatoria" and the "UNIDROIT Principles" followed respectively by 117 respondents (18.31%) and 85 respondents (13.30%).<sup>80</sup> This finding is considered important in this discussion in terms of the perception of global commercial law because of the chosen terminology indicating that global commercial law is compatible with sources of the LM highlighted in this thesis.

One of the most important findings of the Central survey is global practitioners' awareness of the use of global commercial law. In this survey, 202 respondents (32% of all respondents) indicated that they were aware of the use of global commercial law in contract drafting as a choice of law clauses.<sup>81</sup> The result was even higher in the category of the arbitration, which 266 respondents (42% of the all) was aware of the use of global commercial law.<sup>82</sup> The awareness of the use of global commercial law in the category of arbitration is ahead than in the category of the contract negotiations and drafting because the arbitration provides the ideal background for the use and development of the global commercial principles and rules, detached from the constraints of national laws. Hence, the arbitration is the judicial constitution of the global commercial trade as in similarity with judicial branch at the separation of the power.

The significance of the high percentage of the awareness on the use of the LM is underlined by another finding that respondents were not just aware of the single case but also 2-5 cases and 6-10 cases where the LM had been used. 71 respondents (11.27%) were aware of 2-5 cases in

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<sup>79</sup> *ibid*, 222.

<sup>80</sup> *ibid*.

<sup>81</sup> Drahozal and Naimark (n 71) 221.

<sup>82</sup> *ibid*.

which global commercial law had been used as well as 19 respondents (2.97%) practiced the LM for 6-10 cases.<sup>83</sup> Consequently, the high percentage of the respondents' awareness on the use of the LM is striking.

The Central survey also revealed and approved the possible functions of the LM in global legal practice apart from being used as an applicable law. As mentioned in chapter 2 under the functions of the LM, other possible functions of the LM are:<sup>84</sup>

- The global commercial law had been used in connection with national law i.e. the supplementation and interpretation of national law
- The LM had been practiced to interpret or supplement uniform law instruments. The UNIDROIT and Lando Principles are explicit references to this function.
- The significant number of respondents referred to the LM as a means to improve the understanding between parties from different legal systems and with different languages, which is compatible with the UNIDROIT's Study in 1997 where 30.9% of participants used the UNIDROIT Principles to overcome the barriers imposed by different languages and legal concepts.

However, not all the findings of the Central survey are positive on the use of the LM but some negative results emerged out in global legal practices. The Central survey rendered respondents a list of reasons to choose of why the LM was not referred by global practitioners. The most chosen reasons were "vagueness", "uncertainty and unpredictability", "lack of experience" and "lack of information". Even though the survey did not include "vagueness" and "uncertainty" as choices, vagueness and uncertainty were one of the most cited reasons that parties did not agree to use global commercial law. 17 respondents (2.66%) referred to "vagueness" and 25 respondents (3.91%) to the lack of "certainty and predictability" while 184 respondents

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<sup>83</sup> *ibid*, 222.

<sup>84</sup> *ibid*, 224.

(28.79%) referred to “lack of experience” and 100 respondents (15.65%) to the lack of information available.<sup>85</sup> From the reasons given in the surveys, the lack of information and experience were by far tapered off reasons but Professor Peter Klaus Berger clarified this stating that “answers referring to the vagueness and uncertainty of [global] commercial law are by far outweighed by those replies that refer to the lack of practical experience and the fact that no information has been available on the subject of [global] commercial law.”<sup>86</sup> Although the Central survey disclosed a major gap between theory of the global commercial law and its legal reality, the “incompleteness” of the LM do not play an important role in the global legal practice because only 7 respondents referred to it in the Central survey.<sup>87</sup>

The respondents ranked the risks 3.1 (on a scale of 1 to 5, with 5 being “high risk”) for referring to global commercial law in comparison with 2.89 ranking (on a scale of 1 to 5, with 5 being “great benefit”) for the benefit of referring to global commercial law.<sup>88</sup>

Therefore, global legal practices do not follow the misleading argument against the LM such as uncertainty and unforeseen. Rather, global practitioners simply lack the necessary experience and information about the use of the LM as one respondent stated that “among legal counsel and parties, global commercial law is practically not known.”<sup>89</sup> 266 respondents (42%) have indicated that the issue of acceptance of global commercial law is important but without information, there is no chance for the acceptance of the LM among international legal practitioners.

As a result, the dissemination of information about the LM doesn’t keep pace with the globalisation of legal practices. This explains why 275 respondents (43.04%) aren’t certain

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<sup>85</sup>Christopher R Drahozal and Richard W. Naimark (ed), *Towards a Science of International Arbitration* (Kluwer Law International 2005) 228.

<sup>86</sup> *ibid*, 202.

<sup>87</sup> *ibid*, 227.

<sup>88</sup> Luke Nottage, ‘Practical and Theoretical Implications of the Lex Mercatoria for Japan: Central’s Empirical Study on the Use of Transnational Law’ (2000) 4(2) *Vindobona Journal of International Commercial Law and Arbitration* < [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=880388](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=880388) > accessed 5 January 2016.

<sup>89</sup> Drahozal and Naimark (n 85) 228.

whether to use global commercial law in the future. 165 (25.82%) respondents are sure to use global commercial law in the future whilst only 125 (19.56%) respondents refuse to use it.<sup>90</sup> When considering positive attitude (165, 25.82%) and neutral attitude (275, 43.04%) together towards the LM, 440 respondents (68.86%) out of the 639 usable answers in the Central survey reveal the affirmative prospect to the LM as global commercial law. In order to understand why the LM has not adapted with the globalisation of legal practices, the historical evolution of the LM takes place to clarify it into a historic, economic and philosophical context from the medieval term to the global political economy. It beckons the LM's historical examination of the state building phase constituting public and private sphere, to neoliberal global political economy through juridification, pluralisation and privatisation of the legal commercial discipline. Thus, analysing the juridification, pluralisation and privatisation of the legal commercial discipline from Medieval time to the present will indicate the journey the LM has taken and also likely to take in the future as history evolves through a series of conflicts in a predictable and unavoidable direction.

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<sup>90</sup> *ibid*, 230.

## Chapter 4

This chapter reviews the LM's journey from Medieval Times to the present day and on to the future and examines the LM's historical evolution. The historical evolution of merchant law entails to place the LM's debate into a historic, economic and philosophical-political context. As some events, i.e. discovery of state concept and the emergence of capitalism, have been prominent in influencing concepts and developments of the LM, historical materialism is a chosen method in this thesis to evaluate the LM's status and evolution and enables us to analyse the LM's journey in a set of historic blocs. The Gramscian approach to the historical materialism is noted as an important medium in this research because it identifies the material capabilities, ideas and institutions as configuration of social forces, which composes a historical bloc that constitutes authority structure at a given time. The formation of each historic bloc has historically obtained its own social and authority structure that are shaped by social forces. It proves that the nature of authority has changed within generations and with the enforcement of global commercial norms. Therefore, locating and specifying the structure and the nature of authority in the global political economy is bound on the LM. To anticipate the future status of the LM especially in relation to global authority relation, the analysis of its historical evolution is essential and indispensable.

### **1 From the Medieval Merchant Law to the E-Merchant Law**

The LM has evolved from Medieval Time to the present and is perfectly depicted in the title, "From the Medieval Law to the E-Merchant Law". The primary aim of this chapter is to analyse the historical evolution of the LM as a global commercial law in order to challenge the dominant discourses of the LM and de-familiarise the historical process. As Alfred Schutz stated, "action has, temporally speaking, the quasi retrospective character which corresponds

to the future perfect tense: the elements and phases of an action, though they unfold in time, are viewed from the perspective of their having been completed”.<sup>1</sup> Hence, we may regard the present state of the universe as the effect of its past and the cause of its future.<sup>2</sup>

Through analysing the historical evolution of the LM, we witness jurisdiction, pluralisation and privatisation of the legal commercial discipline, which the LM has evidently been affected. With the jurisdiction, pluralisation and privatisation of the commercial law discipline, merchant autonomy has been enhanced within the arbitration to develop the LM as the global commercial law in a way similar to the LM practiced in Medieval Time. More importantly, the significant and enduring links between positive law, globalism and authority structure have influenced by the jurisdiction, pluralisation and privatisation of the commercial law discipline. Therefore, the historical evolution of the LM ought to be examined in a historic, economic and philosophical-political context.

A consequence of the jurisdiction, pluralisation and privatisation of the legal commercial discipline leads to a point where the public/private distinction is a historically specific analytical construct that has undergone revision with changing material, ideological, and institutional conditions. The public/private distinction arose out of a “double movement in political and legal thought”.<sup>3</sup> One being the progression of a nation-state and theories of sovereignty in the sixteenth and seventeenth centuries where the notion of a “public realm” began to form. The second being an attempt to form a “private sphere” that was free from state regulation. Hence, the juridification, pluralisation and privatisation of global commerce are crucial to recognize that state-society relations are being reconfigured by a “privatisation of

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<sup>1</sup> Alfred Schutz, *The Phenomenology of the Social World*, trans. G Walsh and and F Lehnert (Evanston, 1967) 61.

<sup>2</sup> Pierre S Laplace, *A Philosophical essay on probabilities* (Springer, 1814).

<sup>3</sup> Morton J Horwitz, ‘The History of the Public/Private Distinction’ (1982) 130(6) *The University of the Pennsylvania Law Review* < <http://www.jstor.org/stable/pdf/3311976.pdf?acceptTC=true> > accessed 28 January 2016

public power” and the creation of an entirely new ‘private’ realm, with a distinctive ‘public’ presence and oppression of its own: a unique structure of power and domination. Examining the evolution of the LM historically has revealed a logical motion with respect to the expansion of power and to the reinforcement of the private sphere. A diverse line-up of state and non-state agents have participated in constructing and implementing the LM throughout its history. Thus, privatised legal disciplines are increasingly finding their way into both international and national commercial legal orders; structuring domestic and foreign economic relations in ways that have a significant impact on state- society relations and on the political and economic relations between states.

The LM is the chosen terminology in this thesis despite there being no settled definition. This is to display similarities between the LM in Medieval Times and that of today by analysing its evolution and development. The prominent similarity in the historical evolution is the growing significance of non-state authority and the erosion of state authority<sup>4</sup> that has been likened to a re-medievalisation of the world.<sup>5</sup> The LM in the Medieval Age lay the foundations for global commercial law on the basis of similar functions between merchant courts and commercial arbitration.

The characteristic of Medieval LM was its cosmopolitan stand, based on a common origin and reflection of merchant customs and practice.<sup>6</sup> The Medieval LM was a system of law developed by medieval merchants to regulate commerce throughout Europe, North Africa and Anatolia. The primary aim of the Medieval LM was to evolve out of merchant practice and to render it comprehensible and acceptable to merchants, who were the best source of that

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<sup>4</sup> What was meant by state authority in Medieval Age is a dominant authority which was the Feudal authority system because nation-state was non-existent and a fledgling development during Medieval Age.

<sup>5</sup> Claire A Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press 2003)

<sup>6</sup> Leon E Trakman, ‘From The Medieval Law Merchant To E-Merchant Law’ (2003) LIII(3) *University of Toronto Law Journal* <[http://www.mindserpent.com/American\\_History/reference/law\\_merchant/trakman.htm](http://www.mindserpent.com/American_History/reference/law_merchant/trakman.htm)> accessed 3 March 2016, citing P W Thayer, ‘Comparative Law and the Law Merchant’ (1936) 6 *Brook L Rev*.



practice, rather than local rulers. The Medieval LM responded to the needs of the merchants as a class in the light of commercial practice, not to the needs of local rulers. The guiding spirit of the Medieval LM is embodied today in mercantile autonomy and to resistance invasions by nation states into borderless merchant trade. Like the global commercial law, the Medieval LM evolved what was cosmopolitan in nature and transcended local rulers' impositions and interests on merchant practices.<sup>7</sup> Functional methods of dispute resolution have also evolved with the LM. Merchants chose global methods of dispute resolution as distinct from rules of law that are imposed by state courts. Global commercial arbitration has much in common with this version of the Medieval LM. As in Medieval Times, commercial arbitration locations have developed at merchant centres, not unlike courts of fair, and have applied arbitration laws and procedures convenient to merchants, not unlike actions of Medieval courts of fair.<sup>8</sup> Merchants to global commercial disputes, like merchants in Medieval Times, choose to resort to global commercial arbitration distinctive from a local court.

The LM has been evolving since Medieval Time. It is dynamic in nature and extensive in operation. Its applicability contains a huge body of commercial activities: tax and finance regulation, carriage-maritime and transport law, intellectual property law, environmental law, human rights, criminal law etc. The outstanding commercial activity is the E-Trade. It has shifted from a law targeting itinerant merchants within a restricted geographic sector to commercial law targeting online merchants who operate within a virtual and what seems a borderless market. The global extent of this innovative LM are evident to see in the expanding markets for producers. It is also prominent regarding consumer goods and services which is associated with a Law of Information. Global trade is recognised with technology-base access for trading goods and services. In short, what is evident here is a re-emergence of Medieval

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<sup>7</sup> Trakman (n 6).

<sup>8</sup> Ibid.

LM doctrine as a practical response to the fast developing global commercial law of the twenty-first century.

## **2 Critical and Influential Historical Events**

When examining the historical evolution of the LM, some historical events are crucial in their influence on the conception and the role of the LM, which brought about three historical phases illustrating the changing status of the LM. These historic blocs bring to our attention how historical events became realities of global trade by analysing the main reasons behind the events. Through the journey of the LM from Medieval Time to the Twenty-first century, these events have come forward and are historically aligned in order of occurrence.

- Establishment of Nation States
- Emergence of Capitalism
- Distinction of Public and Private Sphere

It is necessary to review the LM's history as an integral aspect of the historical development of the above-mentioned events. Each historical event alters structures of social relations at a given historic bloc. For example, the emergence of capitalism changed the long-standing structure of social relations with the spreading and deepening of commodification and monetisation.

In the light of this brief explanation of historical events, the location and structure of legitimate authority are not obvious in the global political economy. This issue is illustrated with the historical evolution of the LM and is identified in generating and enforcing its norms linking local and global political economies. The LM provides the norms that structure global commercial activities in a manner consistent with "disciplinary neoliberalism".<sup>9</sup> The

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<sup>9</sup>Stephen Gill, 'Globalisation, Market Civilisation and Disciplinary Neoliberalism' (1995) 24 Millennium-Journal of International Studies < <http://mil.sagepub.com/content/24/3/399.full.pdf+html> > accessed 26 March 2016

disciplinary neoliberalism has expanded market opportunities for the private sphere in which the significance of private authority is obscured. This gives rise for an analysis of global authority that incorporates national, sub-national and global influences. This analysis ought to link authority and hegemony and apply the LM at the nexus between private and public activities, economics and politics, and local and global political economies.<sup>10</sup> These rigid conceptual distinctions are premised upon the liberal “art of separation” wherein markets and civil society are regarded as separate and distinct from politics, governments, and the state.<sup>11</sup> Hence, locating and specifying the structure of authority entails a historical approach analysing hegemony. This approach must capture the complex nature of the material, ideational and institutional conditions that have reconstituted the LM in a new historical phase.

### **3 The Preferred Approach: Historical Materialism**

In light of critical and influential historical events, a method examining the historical evolution of the LM is crucial to distinguish the changing role and significance of the LM in characterising historical periods. Particularly, within this context, locating and specifying the structure and the nature of authority in the global political economy is prominent because the concept and role of the LM has changed being contingent upon a global authority structure.

Global society has a range of social forces and dynamics interacting with each other in complex and indefinite ways. These globalising forces have been transforming the material, political, social and cultural life of many individuals on the planet. Existing structures of global society associated with some historical developments are concept of state, marketisation, political pluralism and mass communications. Historical research is highlighted and reinforced with

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<sup>10</sup>Claire A Cutler, ‘Locating “Authority” in the Global Political Economy’ (1999) 43(1) ISQ <  
<http://www.jstor.org/stable/pdfplus/2600965.pdf?acceptTC=true>> accessed 12 November 2014

<sup>11</sup>M Walzer, ‘Liberalism and Art of Separation’ (1984) 12(3) Political Theory <  
<https://www.sss.ias.edu/files/pdfs/Walzer/LiberalismArtofSeparation.pdf>> accessed 28 January 2016

these developments to make an intellectual and historical exercise rather than to make a simple juxtaposition of these events. History involves the interplay between the past, present and future by displaying relationships and interactions of global forces. The Gulf War in 1991 is an excellent example of this:

*It is the most recent chapter in the historical struggle between the Arab world and the West, in contemporary times over the control of oil. More fundamentally, however, it partly reflects not simply the struggles between states, central to neo-realist and liberal institutionalist theorizing, but also the struggles over the organizing principles of society – struggles which began at least as early as the Middle Ages and the era of the crusades – between Western capitalist secular materialism and the metaphysics and social doctrine of Islam, as well as more secular pan-Arab forces in the shape of the Iraqi regime. In this sense, The Gulf War is rooted in the social struggles and transformations which have occurred in the world over many centuries.*<sup>12</sup>

Hence, the historical approach must provide the elaboration of historically integrated, dialectical forms of explanation and must be appropriate to conditions of the twenty-first century. The historical approach studies the global political economy and analyses the following theoretical and practical aspects, especially considering its economic, political and socio-cultural dimensions:<sup>13</sup>

- Examination of structures and factors of globalisation, such as finance, production, migration, ecology and security, and their relations with territorially bounded social structures and forces.
- Analysis to changes in social institutions for instance state and civil society, market and family. It would also engage investigating for state sovereignty, globalisation of authority and prospects of a global civil society so as to develop conception of

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<sup>12</sup> Stephen Gill, *Gramsci, historical materialism and international relations* (Cambridge University Press 1993)

<sup>13</sup>.

<sup>13</sup> Ibid.

citizenship and political accountability consistent with democratic control over economic forces.

- Persistence and change of patterns of interest and identity for example with regard to religion, nationality, ethnicity and gender. Differences would be respected by broadening the capacity for social choice within and across different societies without ethnocentrism.
- Addressing and developing approaches to global issues by analysis of existing and potential forms of political organisation and action at a variety of levels from local to global. In this context, the importance of the existence of the emerging global order is essential in order to prevent the disintegrating and atomising thrust of globalising social forces.

Therefore, the approach that is employed by this thesis to analyse the global political economy requires human knowledge, consciousness and action in the making of history and shaping our collective futures.

### **3.1 Historical Materialism**

Historical materialism (HM) is the chosen approach and recognises the revolutionary potential for a law by reunifying of legal theory and practice in emancipatory praxis. HM is a “Philosophy of Praxis” which is depicted as a nucleus of historical materialism.<sup>14</sup> HM explains the sequence of social forces, structures and events by taking account of the integral social and historical human being, which regards in empirically existing origin rather than metaphysical origin. As Antonio Gramsci stated:

*It has been forgotten, that in the case of a very common expression [historical materialism] one should put the accent on the first term – ‘historical’ – and not on the second . . . The*

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<sup>14</sup> Wolfgang F Haug, ‘From Marx To Gramsci – From Gramsci To Marx: Historical Materialism and the Philosophy of Praxis’ (1999) < <http://www.wolfgangfritzhaug.inkrit.de/documents/GRAMMENXX.pdf> > accessed 25 March 2016, citing Antonia Labriola, ‘Socialism and Philosophy’ (1934).

*philosophy of praxis is precisely the concrete historicisation of philosophy and its identification with history.*<sup>15</sup>

However, there are nonlinear concepts of time to demonstrate social forces and historical events because praxis of philosophy reflects different rhythms and historical tempos whose study are considered critically. Historical analysis being sensitive to different rhythms and tempos consider dimensions of historical time.<sup>16</sup> The first dimension is the relationship between humankind and geography (geographical time), which changes very slowly. The second dimension (social time) is a change of fundamental social structures with a faster rhythm. The third dimension's focus is on individuals, events and particular conjunctures (individual times). History articulates and mediates our thinking through praxis. The philosophy of praxis is the self-enlightenment of human reality in order to examine active positions of humans to each other and to nature.

Karl Marx developed the elaboration of a historicist version of the dialectical method by placing the idea of an integral history and the related concept of social theory at the centre of his analysis. Marxist social theory's core argument is mode of production and inherently social process which are key to comprehend different societies. Historical materialism can be used to analyse all historical forms of society, especially the analysis of a capitalist society<sup>17</sup>, because Marx and Frederick Engel articulated that

*History ceases to be a collection of dead facts as it is with the empiricists (themselves still abstract), or an imagined activity of imagined subjects, as with the idealists.*<sup>18</sup>

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<sup>15</sup> *ibid*, 6.

<sup>16</sup> Gill (n 12).

<sup>17</sup> That was termed by Karl Marx whose main argument is based in.

<sup>18</sup> Hazel Smith, 'The Silence of the Academics: International Social Theory, Historical Materialism and Political Values' (1996) 22(2) *Review of International Studies*

<<http://www.jstor.org/stable/pdf/20097442.pdf?acceptTC=true>> accessed 10 March 2016, citing 'The German Ideology'.

The Marxist approach taking mode of production at the centre of its argument must be re-evaluated and then reinterpreted in the global political economy within the context of historical materialism. The mode of production should not be considered simply as being the production of the physical existence of the individuals because it is a more complex concept in connection with technological development, mass communication, nation state and global relations. Marxist social theory is amalgamated into a recognisably non-positivist, empirically founded yet intrinsically value-laden explanation of human development and the method of historical materialism.<sup>19</sup> Therefore, Marxist modes of production ought to be analysed in the broadest sense in order to capture key dynamics of social relations in different historical blocs.

There have been many attempts to re-assess and re-interpret the Marxist theory in the global political economy as there is no single school and no consensual interpretation of it. The underlying reason for not having a standard understanding of Marxism is hidden in its famous catch-phrase: “Merciless criticism of everything that exists” which includes Marxism itself.<sup>20</sup> This thesis needs to mention the avoidance of using the term “Modernism” As Marshal Berman indicated in his book called “All that is solid melts into air”, what is called modern might not be modern under different circumstances or what appear modern today might not be the same in the future. While finding the true voice of Marxism in the global political economy, the vital source of Marxism, the Philosophy of Praxis, was forgotten and pushed aside. The Philosophy of Praxis stemming from historical experience was disregarded by non-historical materialistic approaches. At the same time, liberal and fascist philosophical attempts re-dynamised themselves within this picture.

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<sup>19</sup> *ibid.*

<sup>20</sup> Karl Marx, ‘Marx to Ruge’ (1843) < [https://www.marxists.org/archive/marx/works/1843/letters/43\\_09.htm](https://www.marxists.org/archive/marx/works/1843/letters/43_09.htm) > accessed 5 June 2016

Antonio Gramsci's attempt to bring back Philosophy of Praxis into the global political economy has been appealing. Gramsci is not a distancing form of Marxism, on the contrary, but re-reads Marxism with an altered perspective in order to analyse today's world. This involves defining the nature, development and dynamics of the global political economy and then dealing with these emerging matters existing in the twenty-first century: global civil society, global aspects of social hegemony and supremacy, global class and bloc formations and regulation of global issues. A distinguishing feature of Gramscian approach prevents 'danger of immediacy' that Marxism and its various forms have succumbed to occasionally. Politics of the immediacy tends to abolish mediating structures of the global political economy like market, law and civil society, thereby linking to a fundamentalist tendency to generate ever increasing expectations of the collapse of capitalism.<sup>21</sup> This theoretical weakness causes marginalisation of Marxist ideas and theories by limitations of its mechanical and ahistorical tendencies, which leads to an implausible argument.

### 3.1.1 Gramscian Understanding of Historical Materialism

The Gramscian approach to historical materialism initiated a constructive dialogue with international relations and studies<sup>22</sup>. Historical materialism that had become marginalised in international studies is being vitalised by Gramscian theorisation of hegemony in the global political economy. Gramsci holds on to the Philosophy of Praxis as a potent force so long as it does not close in upon itself. Gramsci's approach rearticulates historical materialism in the Marxian multiverse in order to respond to the needs of the changing world.

Gramscian historical materialism derives from history and reflects upon specific periods of history which sheds light upon the present. His approach cannot be considered in abstraction

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<sup>21</sup> Haug (n 14).

<sup>22</sup> Concept of International relations and studies is preferred to refer predominance of theories in relation with the global political economy.



from its application that helps to explain particular situations with its explanatory power. Today, the Gramscian approach must analyse new manifestations of global political economy, utilising non-reductionist appraisal.

The development of the philosophical conception of the global political economy is established in the necessity of individuals formulating itself out of the state centred system (positivism).<sup>23</sup>

The complex project of theorising the global political economy leads to a global civil society with all its forms, stakes, forces and actors establishing the global civil society's dimensions as cells of global rationality. Dimensions of the global civil society are located at different levels and differ in their concreteness, being similar to Marxist understanding of "superstructure". Considering the similarities between Marxist analysis of large scale use of steam power and machine tool, and Gramscian analysis of Fordist mode of production<sup>24</sup>, it brings forth the Marxist concept of 'mode of production' gaining contemporary relevance in the global political economy. Analysis of the changing mode of production influences aspects of everyday life especially in political and socio-cultural dimensions of the global civil society such as psychology, sexuality, political ideology, religion and literature. Hence, the Gramscian understanding of the historical materialism is an important instrument to locate and specify the nature of global authority through defining an emerging global order.

The Gramscian understanding of the Philosophy of Praxis attempts to move towards a historicist, reflexive and dynamic form for accounts of the global political economy. This analysis rejects any reductionism to reach a truly realist attitude, which is self-consciously a product of thought not formulated with laws of certainty like quantum mechanics. Historic and social change is cumulative and endless, as opposed to being fixed and immutable, with different rhythms and tempos. The interaction between history and social change exist within

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<sup>23</sup> Haug (n 14).

<sup>24</sup> The basis of Gramsci's analysis of Fordism describes the contemporary economic and social systems based on industrialised, standardised mass production and mass consumption.

dialectics of a given social structure which comprises ideologies, theories, social institutions, socio-economic structure and authority structure. Therefore, the Philosophy of Praxis ought to challenge the subject/object dichotomy of positivist epistemology that underpins prevailing theorisations.<sup>25</sup>

The Philosophy of Praxis considers epistemological and ontological aspects of a given historical period in the context of past, present and future.<sup>26</sup> As Gramsci noted: “Separated from the theory of history and politics philosophy cannot be other than metaphysics, whereas the great conquest in the history of modern thought, represented by the philosophy of praxis, is precisely the concrete historicisation of philosophy and its identification with history.”<sup>27</sup>

The Gramscian approach recognises the intellectual process as a creative, practical yet open-ended and continuous engagement to elucidate an intractable social reality. Gramsci improved the processes of intellectual production in dialectical relation with the processes of historical and social change. His historical materialist epistemology transcends rigid theories of causality and explains the reflexive and dynamic form of the global political economy. The Philosophy of Praxis that is concerned with explanation is inconsistent with the concept of the mechanical causality.<sup>28</sup> Explanation is in this sense meant by the centrality of the interrelationship between social forces in historical development. In addition, this entail the rejection of any model of reductionism such as economic or technological.

Disregarding a given social ontology for the analysis of a specific historical period would not be more than abstract, momentary and incomplete nature of thought-process and knowledge systems. Taking into consideration the ontological aspects of historical materialism avoids a lapse into arguments concerning the determinacy of either politics or economics and the causality trap. The historical materialism contains a unified process of reality between human

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<sup>25</sup> Gill (n 12).

<sup>26</sup> *ibid.*

<sup>27</sup> Haug (n 14) 5 citing ‘Prison Notebooks’.

<sup>28</sup> Stephen Gill, *Gramsci, historical materialism and international relations* (Cambridge University Press 1993).

beings and nature, and signifies dialectical mediation in-between them. The development of the intellectual process's purpose is the philosophy of praxis as Marx stressed the importance of the ontological aspect of the historical materialism: "The vulgar mob [i.e. the classical economists] has therefore concluded that theoretical truths are abstractions which are at variance from reality, instead of seeing, on the contrary that Ricardo does not carry true abstract thinking far enough and is therefore driven into false abstraction."<sup>29</sup>

Engels used a metaphor in which an asymptote (a taken approach) approximates a straight line (social reality) stretching to infinity but never touching. It is an excellent metaphor to depict the significance of the epistemological and ontological aspects of historical materialism in order to make a comprehensive and consistent explanation of social reality.

To conclude Gramscian historical materialism takes into account aspects of the normative structure of society with regard to how normative forces may interact with social forces such as technology and forces of production. This normative account also contains ethical perspectives of global political economy whose fundamental problems reflects sociologically into many of its key concepts such as justice and the ethical relationship between state and society.

### 3.1.2 Gramscian Analysis of Emerging Global Order

A global order has been emerging within the global political economy, whose symptoms and evolving dynamics necessitate its existence. A crucial matter in this context is how structure and nature of authority in the global political economy would be formulated within this emerging global order, bearing in mind that the generation and enforcement of global commercial norms is its determining factor.

The Philosophy of Praxis must find a new elixir bringing out necessities of the emerging global order in order to meet with requirements of the global political economy. Gramscian historical

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<sup>29</sup> Ibid 45, citing *Theories of Surplus Value*.

materialism analyses the global political economy from the bottom upwards, as well as the top downwards with regard to the emerging global order. This thesis will utilise two methods (the bottom upwards and the top downwards) to examine the essentiality of a global order.

In this section, a Gramscian historical and dialectical approach employs a broad based and more integrated perspective for the elaboration of an emerging global order from the bottom upwards. The emerging global order conducting issues of the global political economy has its own specific conditions and dynamics. The Philosophy of Praxis displays a complex and dialectical interplay between social forces as Fernand Braudel stated:

*The coexistence of the upper and lower levels [of civilisation] forces upon the historian an illuminating dialectic. How can one understand the towns without understanding the countryside, money without barter, the varieties of poverty without the varieties of luxury, the white bread of the rich without the black bread of the poor*<sup>30</sup>?

Questions arise from the context of the concept of the emerging global order, which should be investigated in order to build it up on a solid ground:

- What has changed within the emerging global order when taking consideration of the epistemological and ontological perspectives?
- How does it enlighten the nature of social reality?
- What are social reality's key components? And how is the inter-relationship of the components formulated?
- For whom and for what purposes is this order in the global political economy?

When those questions are examined and the true answers are investigated within the concept of the emergent global order, it brings forth prominent dimensions of the global political

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<sup>30</sup> Gill (n 28) 9, citing *The Structures of Everyday Life: Civilization and Capitalism, 15<sup>th</sup>-18<sup>th</sup> Century* (New York, 1981).

economy which is core and central for the existence and development of the emerging global order. The prominent dimensions within the global political economy are:

- (i) Economic dimension transforms the restructuring of global production, finance and exchange, challenging previous sets of economic organisation and regulation.
- (ii) Political dimension comprises institutional changes having directly or indirectly been affected by the nature and structure of global authority which includes changing forms of state and the growing existence of the global civil society.
- (iii) Socio-cultural dimension challenges and affects embedded sets of social structures, ideas and practices in connection with the political and economic dimension.

Being aware of the impacts of emerging global order would be uneven on the base of different social structures and forces such as between so called developed-developing countries or First-Third worlds, this thesis acknowledges the requirement of the existence of the emerging global order on the base of distinction between global issues and local issues. In addition to that, social and cultural differences would be protected by local laws that have existed within the current positive system taking state in the centre of decision-making processes.

The increasing interaction and integration within the global political economy between the nature and human beings coming from different background geographically, politically as well as socio-culturally has been enhanced within the essence of global issues. In order to regulate global issues democratically and fairly, the necessity of the emerging global order is entailed by differences of nature and scope of global issues as opposed to that of local issues.

Regulation of global issues influences the pattern of evolving governing arrangements especially given the growth of global and regional bodies equipped with a broad range of regulatory powers, has shown now an emergence of new institutional configurations. It is important to analyse enduring links between state sovereignty, the global political economy and the emerging global order, which were established through the increasing juridification,

pluralisation and privatisation of legal commercial disciplines. The juridification, pluralisation and privatisation of the legal commercial discipline are crucial to recognise that state-society relations are being reconfigured by the global political economy. Despite the division of the globe by the dominant state sovereignty system with regard to the regulation of global issues, the emerging global order is still being developed in order to maintain and enhance a common language that promotes a fair, predictable, secure and open-ended global environment. This involves the internal and external restructuring of the state and global civil society in response to impacts of the dimensions of the global political economy such as redefinitions of state sovereignty.

Gramsci believed that the state and civil society, where the foundations of social hegemonies are built, should be scrutinised.<sup>31</sup> This aspect of global political economy is reflected in his conception of hegemony, giving substantive attention to the Marxian concept of the “base-superstructure” as in the dimensions of the global civil society. As Gramsci stated:

*Critical understanding of self takes place therefore through a struggle of political ‘hegemonies’ and of opposing directions, first in the ethical field and then in politics proper, in order to arrive at the working out at a higher level of one’s conception of reality. Consciousness of being part of a particular hegemonic force (that is to say political consciousness) is the first stage towards progressive self-consciousness in which theory and practice will finally be one. Thus the unity of theory and practice is not just a matter of mechanical fact, but part of a historical process, whose elementary and primitive phase is to be found in the sense of being ‘different’ and ‘apart’, in an instinctive feeling of independence, and which progresses to the level of real possession of a single and coherent conception of the*

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<sup>31</sup> Gill (n 28).

*world. This is why it must be stressed that the political development of the concept of hegemony represents a great philosophical advance as well as a politico-practical one.*<sup>32</sup>

In the meantime, it is crucial to clarify at the outset what is meant by ‘hegemony’ in accordance to a Gramscian concept of hegemony because there are wide uses of this term e.g. hegemony is used as a euphemism for imperialism. Hegemony shouldn’t be seen as superior over a single state or a cluster of states exercising power over other states. Therefore, for the purpose of clarity, what Gramsci means by the term ‘hegemony’ is dominance. Human beings have a degree of free will and consciousness regarding the limits of what is possible.

Gramscian social theory is conceived as a totality primarily constituted by modes of production, studying analytically into ideas, institutions and material capabilities.<sup>33</sup> Despite these analytical separations, a totality remains general and integrated. However, there is no necessary harmony among the dimensions of the global political economy as in Marxist concept between ‘base’ and ‘superstructure’. For example; a capitalist mode of production can correspond either with dictatorship or parliamentary democracy. What is crucial is to place each of these sets of ideas, social institutions and material capabilities in its proper socio-historical context, considering their importance and meaning can change over time.

Gramscian hegemony expounds the nature of authority with the complexity of state-civil society relations rather than state-centred system. The nature of authority is pertained to the strength of the dynamic synthesis among social forces, thereby forming, what Gramsci called, a historic bloc. Hegemony is more complex at the global level although there is a substantial framework of considerable amount of global law and institutions at the global political economy such as arbitration. However, the global political economy must be conceived as a

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<sup>32</sup> Gill (n 28) 37, citing *Selections from the Prison Notebooks of Antonio Gramsci* (London: Lawrence and Wishart, 1971).

<sup>33</sup> Ibid.

totality due to its social dimensions operating not territorially bounded or determined as distinct from that of state-centred system. Hence, the concept of the hegemony must transcend narrowly based economic or political perspectives and must have universal position synthesising global interests.

As a result, Gramscian approach identifies the material capabilities, ideas and institutions, as configuration of social forces, which composes a historical structure or bloc that constitutes global authority at given time.<sup>34</sup> Gramsci adopts an explicitly historical materialistic approach, challenging the ontological, epistemological and ideological foundations of neorealism and neoliberalism.

#### **4 Historical Evolution of the LM: Historical Blocs**

This section analyses how changing material, ideational and institutional conditions have constructed the nature and structure of the political authority with respect to the historical evolution of the LM. The interrelationship between the LM and the political authority leads to the analysis of historic blocs as a method in which the nature and structure of political authority has changed within generations and the enforcement of global commercial norms. The location and structure of the authority changed with the emergence of different historic blocs indicating alterations in state-society relations regarding the history of the LM.

Gramsci views that state and society together constitutes a solid social structure until another structure replaces a predecessor. In this context, a structure is regarded as a historic bloc by Gramsci. LM is one of suitable examples for manifesting state and society relationship, taking the law merchant's journey from feudal times through to the emergence of current state system to a capitalist political economy so as to demonstrate how a changing social structure has

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<sup>34</sup> Claire A Cutler, 'Locating "Authority" in the Global Political Economy' (1999) 43(1) ISQ < <http://www.jstor.org/stable/pdfplus/2600965.pdf?acceptTC=true>> accessed 12 November 2014



affected the commercial norms, thereby influencing the nature and structure of the authority. In the dialectical concept of a historic bloc, Gramsci manifested the social totality as interacting elements (ideas, institutions and material capacity) as superstructure and structure: “Structures and superstructures from an ‘historic bloc’. That is to say the complex contradictory and discordant ensemble of the superstructures is the reflection of the ensemble of the social relations of production.”<sup>35</sup>

The nature of the social unity changes in the mode of production in which a new order challenges an established order. The mode of production must be construed as in the broadest sense, not being confined to the production of physical goods used or consumed. Different modes of production generate different authority structures, which leads to the term “hegemony” and then rests upon an historic bloc. A historic bloc cannot exist without a hegemonic social class. A new bloc is formed when a subordinate class establishes its hegemony over other subordinate groups. Therefore, a historic bloc has a revolutionary orientation through its focus on social unity and the coherence of socio-political orders.

The historical specificity of the LM begins to appear with moves from feudalism to absolutism, to mercantilism and to capitalism. The LM has its own particular features and structures at each historical epoch especially in relation with political authorities.

Feudalism → Absolutism → Mercantilism → Capitalism

The historical journey of the LM started tracing the origin and early development that operated outside the general social and economic conditions of medieval time; with the emergence of a state system, the tendency toward the nationalisation of the LM; and then the revival of the emphasis upon the LM’s global character from feudal to capitalist bloc.

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<sup>35</sup> Gill (n 28) 56, citing Antonio Gramsci *Selections from the Prison Notebooks of Antonio Gramsci* (London: Lawrence and Wishart, 1971).

## 4.1 Feudal Historic Bloc

Conceptions of commercial norms have changed infinitely over time since the first trade transaction. The first historical bloc is the ancient the LM in Medieval Times. Merchants had a desire to develop a medieval trade that was limited and constrained by a highly localised system. The merchant community started experiencing a commercial renaissance in the eleventh and twelfth centuries through the rise of towns and cities as autonomous political units.<sup>36</sup> However, the LM did not spring from a void, a considerable part of it was based on regulations of Roman Empire times. Roman law provided some arrangements for handling domestic and global commercial problems. As Goldman remarked, *Ius Gentium* (Law of Nations) was a precursor for the LM, which regulated economic relations between foreigners and Roman citizens.<sup>37</sup> That is to say that the historical roots of the LM can truly be found in the Middle Ages. The Medieval LM had a cosmopolitan character and was applied to cross-border disputes in order to overcome fragmentary and obsolete rules of feudal law that could not respond to needs of medieval trade. Consequently, the Medieval LM broke bonds of localised feudal commercial constraints to develop a cosmopolitan character of commercial norms.

All developments relevant to the medieval trade should be considered in a feudal mode of production that was dominated by land and natural economy. Agricultural property was controlled by a class of feudal lords who extracted a surplus from peasants by politico-economic relations of compulsion. In feudal societies, the right to rule was neither territorialised nor centralised but diffused and ambiguous as Perry Anderson describes the

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<sup>36</sup> Harold J Berman and Colin Kaufman, 'The Law of International Commercial Transactions (Lex Mercatoria) (1978) 19(1) Harvard International Law Journal <  
[http://heinonline.org/HOL/Page?handle=hein.journals/hilj19&div=9&g\\_sent=1&collection=journals#](http://heinonline.org/HOL/Page?handle=hein.journals/hilj19&div=9&g_sent=1&collection=journals#)>  
accessed 11 January 2016,

<sup>37</sup> Ana M L Rodriguez, 'Lex Mercatoria' (2002) RETTID <[http://law.au.dk/fileadmin/site\\_files/filer\\_jura/dokumenter/forskning/rettid/artikler/20020046.pdf](http://law.au.dk/fileadmin/site_files/filer_jura/dokumenter/forskning/rettid/artikler/20020046.pdf)> accessed 01 December 2014

feudal mode of production as an organic unity of economy and polity.<sup>38</sup> The feudal mode of production gave rise to a constant struggle to establish a local authority to the compact web of the cosmopolitan medieval LM. The medieval LM provided a normative framework for merchants engaged in long distance trade and for residing in special towns and cities where merchants enjoyed significant freedom and autonomy, this being very similar to today's global companies. The authority structure of Medieval Time reflected ambiguity with regard to production and exchange. Local transactions were heavily regulated by religious and a diversity of political authorities while long distance and overseas trade was conducted by merchants under their own system of law, procedure and institutions.<sup>39</sup> The feudal authority structure is thus best characterized by a fusion of the polity, economy, and society.

Understanding and adopting the cosmopolitan concept of commercial norms in medieval times have to take into consideration the respective period's conjunctures which are the fall of the Roman Empire, commercial revolution of the eleventh through fifteenth century and European Renaissance. Medieval trade was conducted largely at fairs of commercial towns and cities whilst the LM was developed especially in Europe. This was stated:

*The merchants were a class distinguished from the rest of the community by legal privileges that gave them a protection which others did not share, while market and fair formed a separate judicial unit which no royal judge could enter.*<sup>40</sup>

With the fall of the Roman Empire, commercial activities in the Medieval Age were almost non-existent. Through rapid expansion in agricultural productivity, medieval trade stimulated to move into towns many of which rapidly became cities of substantial size in order to meet

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<sup>38</sup> Cutler (n 34).

<sup>39</sup> Ibid.

<sup>40</sup> H L Hayes, 'Modern Lex Mercatoria: Political Rhetoric or Substantive Progress' (1977) 3(2) Brooklyn Journal of International Law  
<[http://heinonline.org/HOL/Page?handle=hein.journals/bjil3&div=17&g\\_sent=1&collection=journals#](http://heinonline.org/HOL/Page?handle=hein.journals/bjil3&div=17&g_sent=1&collection=journals#)>  
accessed 11 January 2016, citing W Mitchell 'An essay on the Early History of the Law Merchant' (1904).

changing, growing requirements of commercial transactions and activities. The medieval LM was not the product of a single community of merchants located at a single place. The medieval LM found its roots in diffuse codes that evolved in different locations.<sup>41</sup> The prominent codes were Rolls of Oleron (an island of the French Atlantic coast), laws of Wisby (a port on an island of the Baltic Sea) and statutes and compilations of Italian and Spanish towns and cities particularly notable the marine customs of Barcelona and its Consular Court.<sup>42</sup> These codes took note of the flux within the new formulation of commercial custom and usage as well as recording the entrenched merchants practise. Therefore, the Medieval LM was anticipated to be stable in nature and all-embracing in application.

Commercial guilds played an important role in developing the distinctive features of the cosmopolitan medieval LM within these cities and towns because they were set up on trade routes and at trade centres in different parts of the medieval world. In contrast to merchants' status in the Dark Age Time of Trade between 6<sup>th</sup> and 10<sup>th</sup> centuries, which were unfree agents of secular or ecclesiastical landlords, the medieval trade was revived through the commercial revolution of the eleventh through to the fifteenth century. Medieval merchant communities then became independent by long-distance trades on which local authorities were unable to control on merchants' actions.<sup>43</sup>

One of the substantial achievements of the guilds was to lead the engagement in non-simultaneous transactions as well as the provisions of security indispensable for long-distance trades in order to expand the medieval trade. For example; a Frisian guild merchant would not act according to Frisian law but according to the rules of his guild, whether he was in Frisia or

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<sup>41</sup> E L Trakman, 'From The Medieval Law Merchant To E-Merchant Law' (2003) LIII(3) University of Toronto Law Journal <[http://www.mindserpent.com/American\\_History/reference/law\\_merchant/trakman.htm](http://www.mindserpent.com/American_History/reference/law_merchant/trakman.htm)> accessed 3 March 2016

<sup>42</sup> Berman and Kaufman (n 36).

<sup>43</sup> O Volckart and A Mangels, 'Are the Roots of the Modern Lex Mercatoria Really Medieval?' (1999) 65(3) Southern Economic Journal < <http://www.jstor.org/stable/pdf/1060808.pdf?acceptTC=true> > accessed 9 July 2015.

elsewhere.<sup>44</sup> There were three different distinguished transactions in the medieval commerce: those among members of one and the same guild, those between merchants from different guilds and those between merchants and non-merchants.<sup>45</sup> In this context, this demonstrated that it was extremely difficult for merchants to enforce institutions regulating non-simultaneous transactions between members of the same guild or another guild or outsiders. Accordingly, this brought about political and social changes in the Medieval Time, which occurred in towns and cities developing from feudal or ecclesiastical administrative centres into autonomous political organisations. Within the emerging market towns and cities, permanently inhabited merchants granted privileges: not to only members of specific guilds but to all merchants living there.<sup>46</sup> Therefore, most medieval towns and cities were free to arrange many of their affairs distinguishing merchants from the rest of the population, aiming at reducing political influence exerted by feudal rulers. Through contributions of merchant guilds, the emergence of medieval institutions displayed some similarities to the way that the LM and other institutions have been developed in the global political economy. Dissimilar to national laws, feudal law did not have to be supplanted but rather supplemented by merchant-devised institutions.

With the increased productivity in agriculture and urbanisation, the emergence of the medieval merchant community class arose in order to overcome barriers for a substantial universal trade. Thousands of traders who spoke different languages and from different cultural backgrounds travelled to fairs and markets regardless of preventing direct communications of geographic distances. A system of medieval trade existed that was localised, with often contradictory laws and business practices produced hostility towards foreign commercial customs that were not sufficient to meet the needs of the medieval merchant class. So as to avoid complexities that hindered communication and inhibited the medieval commerce, there was a clear need for Law

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<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

as a “language of interaction”.<sup>47</sup> Hence, a law dominating the medieval merchant community was the Lex Mercatoria which reinforced rather than superseded business practice and regulated merchants as to what they had already agreed to do. As merchants began to transact across political, cultural and geographic boundaries, the LM facilitated the need for a uniform of laws of medieval commerce. It was articulated that

*“ . . . the basic concepts and institutions of modern Western mercantile law - lex mercatoria (“The law merchant”) – were formed, and, even more important, it was then that mercantile law in the West first came to be viewed as an integrated, developing system, a body of law ”*<sup>48</sup>

A universal commercial law, the LM, was a prerequisite for the rapid development of medieval trade. Otherwise, alien merchants required protection against potential discrimination by locally enforced laws and would not have been willing to reach out existing potential of the respective period. Landes and Posner noted that

*“ . . . there would appear to be tremendous economies of standardization in [law], akin to those that have given us standard dimensions for electrical sockets and railroad gauges. While many industries have achieved standardization without monopoly, it is unclear how the requisite standardization of commonality could be achieved in the [law] without a single source for [law] – without, that is to say, a monopoly. . . ”*<sup>49</sup>

Therefore, the Medieval LM as a cosmopolitan law governed a class of individuals (merchants) in special places (fairs, markets and seaports), which was distinct from local, feudal, royal and ecclesiastical law.

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<sup>47</sup> L B Benson, ‘The Spontaneous Evolution of Commercial Law’ (1989) 55(3) Southern Evolution of Commercial Law < <http://myweb.fsu.edu/bbenson/SEJ1989.pdf>> accessed 15 January 2016.

<sup>48</sup> Ibid, citing *Law and Revolution: The Formation of Western Legal Tradition* (Cambridge, 1983).

<sup>49</sup> Benson (n 47), citing “Adjudicating as a Private Good” *Journal of Legal Studies* (1979).

Moreover, medieval merchants set up their own court to settle disputes in accordance with their own laws without taking recourse to feudal or ecclesiastical jurisdiction. In these courts, judge and jury were comprised of merchants.<sup>50</sup> Merchants established their own courts for several reasons<sup>51</sup> but the substantial reason was to enforce their own law because resolutions of commercial disputes often had to be achieved after consideration of highly technical issues.<sup>52</sup> The most cited characteristics of the medieval merchant courts were their speed and informality in order to reduce transaction costs and adapt rapidly changing commercial dynamics.<sup>53</sup> A dispute had to be settled swiftly (especially for perishable goods) to minimise disruption of business affairs so as to move in one market to the next, where appeals were forbidden for unnecessary litigations and delays. These features of the medieval merchant courts stressed that decision-making processes needed to be fair with justice and that merchant disputes needed to be resolved expeditiously with the least cost and by the most efficient means. The medieval LM was largely self-enforcing; a party who refused to comply with a merchant court's decision risked their reputation and then could be faced by the threat of ostracism by which merchants was excluded from trading at the all-important fairs where merchant courts were located.<sup>54</sup> In this context, reputation played a similar role as it does today in the global political economy. A loss of reputation means a loss of opportunities as well as a loss of security for medieval traders that the merchant community provided.

The law evolving from the medieval merchant courts was as the LM noted: "The importance of this law was evident throughout Europe. For instance, the English Statute of the Staple of

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<sup>50</sup> Hayes (n 40).

<sup>51</sup> For example: (i) Royal courts of the day would not consider disputes arising from contracts made in another nation. (ii) Common-law courts would not consider books of account as evidence despite the fact that merchant held such records in high regard.

<sup>52</sup> Volckart and Mangels (n 43).

<sup>53</sup> Benson (n 47).

<sup>54</sup> Volckart and Mangels (n 43).

1353 declared that merchants “shall be ruled by the law merchant as to all things touching the Staple and not by the common law of the land.”<sup>55</sup>

After analysing the characteristics of the medieval merchant courts, it shows that as medieval merchant judges gradually evolved into a professional judiciary, their practice and experience continued to develop through their familiarity with commercial arbitrators into the twenty-first century. Thus, merchant justice is contingent upon merchant needs and satisfactions that has constituted the rallying calls for today’s commercial arbitration since Medieval Time.

As a result, Lex Mercatoria is the preferred term to describe the evolution and development of the law merchant because many if not most of the structural elements of today’s system of commercial law were formed in Medieval Time.<sup>56</sup> For almost eight hundred years, the LM has been applied among traders.

## **4.2 Absolutist State Bloc**

When analysing the timeline of the LM, its second phase is the absolutist state bloc for which Peace of Westphalia in 1648 has an important place. It started a process of the pluralisation of commercial norms as in the juridification, pluralisation and privatisation of the commercial law discipline. Medieval LM declined its cosmopolitan character towards the end of medieval times with the development of the concept of nation-state. Sovereign nation states began to regard the medieval LM as an external threat to their internal cohesiveness. In an attempt to subject each national state’s citizens to a respective single national law, the medieval LM as the autonomous and cosmopolitan commercial norms disappeared from being part of nation states’ domestic legal orders. Hence, the assimilation of the medieval LM into separate national legal systems rendered it subject to the idiosyncrasies of each nation-state.

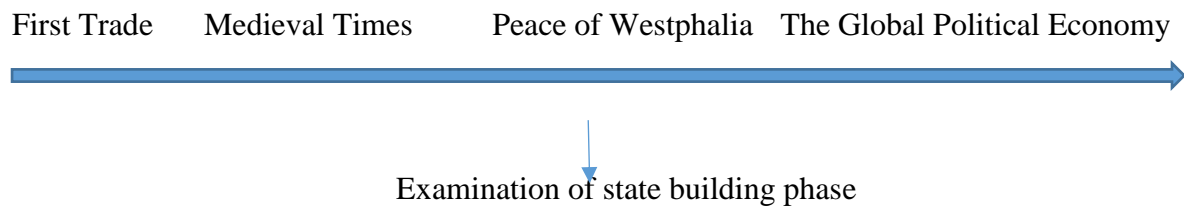
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<sup>55</sup> B M Cremades and S L Plehn, ‘The New Lex Mercatoria and the Harmonisation of the Laws of International Commercial Transactions’ (1984) 2(3) Boston University International Law Journal  
<[http://heinonline.org/HOL/Page?handle=hein.journals/builj2&div=24&g\\_sent=1&collection=journals#citation\\_tab\\_box](http://heinonline.org/HOL/Page?handle=hein.journals/builj2&div=24&g_sent=1&collection=journals#citation_tab_box)> accessed 20 December 2015

<sup>56</sup> Benson (n 47).



**Figure 1: Timeline of the LM**



However, the precepts of medieval the LM did not die; but it was affected because nation states nationalised, rather than eradicated, the substance of the medieval LM. This made the LM less universal and more localised under the states influences and then reflected on its policies, interests and procedures. Many of desirable features of the medieval LM were hampered by the absolutist state bloc, including its universal character, its flexibility and dynamic ability to grow, its formality and speed, and its reliance on commercial custom and practice.<sup>57</sup> On the other hand, the medieval LM could not be completely eliminated as merchant customs and practices prevail in global trade and have not been negated by nationalisation of commercial norms. As a result, national state systems of commercial law evolved as official regulators of both domestic and international business.

It is more important to consider the consequences of the absolute state bloc on the application and growth of the LM, regarding the potential of how medieval trade could have developed through without concept of nation state. The absolutist state bloc transformed the LM into separate spheres of civil society and states with the growing territorialisation, localisation and centralisation of political authority. This bloc provided the pluralisation of the commercial discipline by incorporating the LM into national laws of each country and then led up to the privatisation of the commercial discipline which will be analysed in the capitalist historic bloc.

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<sup>57</sup> Benson (n 47).

The recognition of separate private and public realms translated into the distinction between public and private international law.<sup>58</sup> Public international law applied to states and their international relations, while private international law applied to private individual and corporate actors. The LM and its courts were incorporated into domestic legal systems where they were reconfigured as private international trade law. In other words, with the rise of nationalism and the pluralisation of the commercial legal discipline, the LM became blended with the peculiarities of municipal laws of each country and thus lost its uniform character. As states took control over global trade, national mercantile laws regulated economic relations and cross-border disputes by referring to private international law.

In this atmosphere, the LM did not possess universal and cosmopolitan character because nation state fragmented the medieval the LM. For example; in terms of property law, if one bicycled from Basel to Strasbourg, the bicycle went through three different legal regimes of ownership.<sup>59</sup> Each municipal law was imposed by national states that subjugated all other sources of law. Other sources of law did not have independent status because they were not considered legitimate without governmental recognition. In summary, the absolutist state bloc fragmented the universal character of the medieval LM but it has far from destroyed it.

### **4.3 Capitalist Historic Bloc**

The capitalist historic bloc witnessed the revitalisation of the global community of merchants, where industrial revolution ignited the growth and integration of global trade. Merchants have engaged in the global trade across national boundaries not only by standard ways: import, export, foreign direct investment etc. but also by considering the crucial role of information technology. A global merchant community has emerged and discovered new methods to adapt

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<sup>58</sup> A C Cutler, 'Locating "Authority" in the Global Political Economy' (1999) 43(1) ISQ < <http://www.jstor.org/stable/pdfplus/2600965.pdf?acceptTC=true> > accessed 12 November 2014

<sup>59</sup> Jan Dalhuisen, 'The Sources of the Modern Transnational Lex Mercatoria' (2012) < <http://opiniojuris.org/2012/04/02/the-sources-of-the-modern-transnational-lex-mercatoria/> > accessed 19 May 2016

and then adjust in global trade so as to develop the interplay of world population. For instance; a plethora of online transactions and dispute resolution services requires a new cyberspace law merchant, which is the delivery of an adaptable body of cyberspace literature to the fastest growing body of merchants who habituate the internet.<sup>60</sup>

In the context of globalism, the capitalist historic bloc describes economic and social systems based on industrialised, standardised mass production and mass consumption despite that the process of globalisation is a multifaceted phenomenon with economic, social, political, cultural, religious and legal dimensions.<sup>61</sup> This bloc's growth became dominant in advanced capitalist countries during post-war reconstruction and is credited with facilitating the long post-war boom.

Following the Second World War the development of global trade pointed to defects regarding traditional regulations of commercial contracts. The business community needed simplicity and certainty. The complex nature of private international laws along with the out of date character of domestic law was unsatisfactory for its needs. While global trade has been developing<sup>62</sup>, the needs for an universal commercial law can no longer be denied in order to avoid complexities and diversities of national laws. Hence, the existence of a global business law has an increasing importance in the context of globalism as the integration of world economies and financial interdependency of national economies has been augmented. In this globalising world, a global commercial law plays an important role to provide a common language and business culture, which enables merchants, from diverse legal and political systems, to speak to one another and to transact in a relatively stable, fair, predictable and

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<sup>60</sup> E L Trakman, 'From The Medieval Law Merchant To E-Merchant Law' (2003) LIII(3) University of Toronto Law Journal <[http://www.mindserpent.com/American\\_History/reference/law\\_merchant/trakman.htm](http://www.mindserpent.com/American_History/reference/law_merchant/trakman.htm)> accessed 3 March 2016

<sup>61</sup> B S Santos, 'Globalizations' (2006) 23 Theory, Culture & Society <[http://www.boaventuradesousasantos.pt/media/pdfs/Globalizations\\_Theory\\_Culture\\_and\\_Society\\_2006.PDF](http://www.boaventuradesousasantos.pt/media/pdfs/Globalizations_Theory_Culture_and_Society_2006.PDF)> accessed 2 December 2015

<sup>62</sup> The progress of Global trade will be analysed in Chapter 5.

secure business environment. The unification and universalisation of a law of commercial transactions and its separate commercial court necessitated some institutional changes especially with regard to economic and political alterations including the changing forms of state in the context of globalism. Therefore, LM meets needs and requirements of the global political economy and functions to ensure a unity of purpose and coherence in regulation that is obscured by notions of pluralistic or a fragmented government.

The piecemeal regulation of the absolutist state bloc contrasted sharply with the increasingly universal character of world trade. Like feudal lords of the medieval time, today's nations realise that fragmented regulation of global trade through the application of independent national laws impedes the growth of global trade. An analogy is prominent between today's merchants and medieval merchants whose activities were superimposed on a patchwork of local sovereignties and were hardly amenable to local regulations.<sup>63</sup> Thus, just as medieval merchants overcame feudal law, merchants of the capitalist historic bloc were adopting alternative solutions to avoid the application of national law to their transactions.

As opposed to the historic state bloc in which the rise of state came hand in hand with the decline of LM, the capitalist historic bloc in which the relative decline of state and the rise of global commerce occurred invokes for the renaissance of the LM. The LM's precepts have reappeared in the vibrant global commercial law. It is an autonomous and independent global commercial law, transcending parochial interests of nation states. The dynamic ideology of the LM is pragmatism: commercial norms are grounded in commercial practices and customs which are free from inefficient government intrusion.

Functional methods of dispute resolution have also developed with this developing LM. Arbitration is the prominent method and takes the task of adjudication. Arbitration resolves merchant disputes time and cost effectively and in light of merchant practice and custom.

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<sup>63</sup> Cremades and Plehn (n 55).

Commercial arbitration has re-emerged as a viable option for business disputes in order to avoid state interference and to alleviate court congestion and delay. As in Medieval times, commercial arbitration has developed at merchant centres, not unlike courts of fair, and have applied arbitration laws and procedures to suit merchant clientele, not unlike the actions of medieval courts of the fair.<sup>64</sup>

To sum up all efforts of the global political economy regarding the LM, the general Assembly of the UNCITRAL evidently stated in 1965:

*Recalling that it is one of the purposes of the United Nations to be centre for harmonizing the actions of nations in the attainment of such common order as the achievement of [global] co-operation in solving, inter alia, [global] economic problems.*

*Convinced that it is desirable to further co-operation among the agencies active in this field and to explore the need for other measures for the progressive unification and harmonization of the law of [global] trade.*<sup>65</sup>

Contemporary developments in LM are both mirroring and structuring the global political economy. Capitalist mode of production separates economic exchange relations from political relations under capitalism as distinct from the feudal and absolutist mode of production. It is important to note that ‘separation’ means that economic relations are insulated from political control. As Woods noted, the capitalist modes of production takes a form of distinct juridical and political relations which she identifies as modes of domination and coercion, forms of property and social organisation that are components of the capitalist productive relations.<sup>66</sup> The capitalist mode of production transformed political powers into economic powers and defined the latter as a separate ‘apolitical’ sphere.

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<sup>64</sup> Trakman (n 60).

<sup>65</sup> H L Hayes, ‘Modern Lex Mercatoria: Political Rhetoric or Substantive Progress’ (1977) 3(2) Brooklyn Journal of International Law  
<[http://heinonline.org/HOL/Page?handle=hein.journals/bjil3&div=17&g\\_sent=1&collection=journals#](http://heinonline.org/HOL/Page?handle=hein.journals/bjil3&div=17&g_sent=1&collection=journals#)>  
accessed 11 January 2016

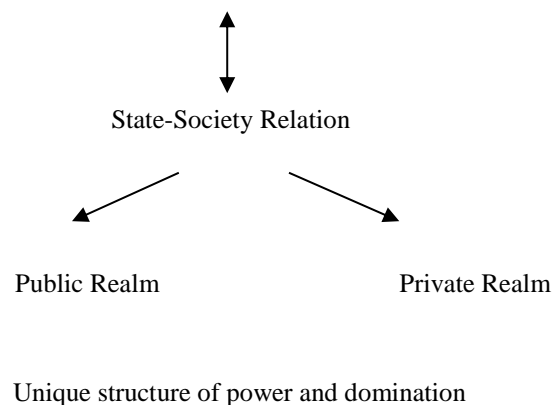
<sup>66</sup> Cutler (n 58).

In the capitalist modes of production, LM constitutes juridical conditions of global capitalism but LM as the global commercial law has not been evidently formulated within existing legal and political theories. It is therefore crucial to elucidate LM visible by examining normative foundations of the global commercial law and by studying the process and agents involved in generating and enforcing its norms in the global political economy. As a result of the juridification, pluralisation and privatisation of the commercial legal discipline, LM was privatised and neutralised of political content as it became a component of private international trade law.

The state-society relation to the capitalist historic bloc has been affected by the juridification, pluralisation and privatisation of global commerce in the context of the separation of economics and politics. The separation between the economics and politics leads to other rigid conceptual distinctions, which are premised upon liberal “art of separation” wherein markets and civil society are regarded as separate and distinct from politics, governments and the state. Ensuing distinction as a result of the distinction of economics and politics are distinctions between private and public sphere and civil society and state. Impacts of the distinction between private and public sphere will be analysed in details in regard of economic and legal perspective further in the thesis.

**Figure 2: State and Society Relation to the Capitalist Historic Bloc**

The Juridification, Pluralisation and Privatisation of Global Commerce



As a result, the nature of authority globally has changed and shifted with vicissitudes in the capitalist mode of productions. The challenge lies in depicting authority in the capitalist historic bloc where political authority ostensibly stops at territorial borders of states, while economic relations do not. The restructuring of global commerce and power appear to have begun to transform the basis of political authority, legitimacy and accountability away from national levels to global levels. A significant structural changes in the existing world order are more likely to lead to some fundamental changes in social relations, which requires a new world order to regulate social forces. Therefore, the global political economy requires us to move on in a new historical bloc, namely a global order, to regulate global trade as well as other global issues. The following chapter will analyse the global political economy with regard to its economic perspective as a base-superstructure of interrelationship of social forces and its authority structure that manifest requirements and demands for a new historic bloc entailing a global order, for which LM plays a key role.

## **Chapter 5**

Global trade has grown extensively especially in the last two decades as globalisation increases the integration of world economies and financial interdependence of national economies. Globalising social forces integrate the material, political, social and cultural life of many people on the planet in the global political economy. Besides, significant structural changes in the existing world order leads to some fundamental alterations in social relations, which requires a new world order to regulate global issues. In order to manifest and substantiate requirements and demands for new global order in a new historic bloc, the global political economy will be analysed in this chapter from the top downwards, complementing the analysis bottom upwards in chapter 4. In the new historic bloc, the analysis of interrelationships of the social forces is essential and indispensable to establish the role of LM and the structure of the new global order. This chapter will analyse the global political economy with regard to its economic perspective as base-superstructure of the interrelationship of social forces and its authority structure in line with Marxism. Therefore, Marxism must find a new elixir bringing out the necessities of the emerging global order so as to elucidate the more precise role and significance of LM in the global political economy.

### **1 Global Integration and Global Civil Society**

Globalisation features global civil society through the growing global integration of production and financial structures, complex communication grids, the rapid innovation and diffusion of technology and the worldwide dissemination of information and consciousness. The processes of globalisation are a multifaceted phenomenon with economic, social, political, cultural, religious and legal dimensions, which all interlinked in a complex fashion. It relates to a vast array of transformation across the globe for example the dramatic rise in inequality between



rich and poor countries and between the rich and poor in each country, environmental disaster, global mass migration, global economic crisis, ethnic cleansing, terrorism and militarism etc. In order to display the scope and effects of global integration and interaction, recent examples of the Syrian refugee crisis and the Greek economic crisis are striking and important to demonstrate their wave effects on the rest of the world. The extraordinary range and depth of global interactions have led us to view them as a rupture with the existing world system that is state-centric.

The concept of globalisation contains both descriptive and prescriptive component on which the hegemonic consensus is rendered in the mid-1980s.<sup>1</sup> This consensus is known as the ‘neo-liberal consensus’ or ‘Washington consensus’, which is a set of 10 economic policy prescriptions. The core capitalist states subscribed to it and represents hegemonic globalisation. The consensus contains a vast set of domains: world economy, social policies, state-civil society relations and international relations. The Washington consensus covers four major issues:<sup>2</sup>

- Consensus of (neo)liberal economy, emphasises that national economies must open themselves up to the world market; domestic prices must be accommodated to global prices; the entrepreneurial sector of the state must be privatised; there must be free mobility of resources (except labour); state regulation of the economy must be minimal; social policies must be a low priority in the state budget.
- Consensus of weak state, means the state, rather than being mirror of civil society, is civil society’ potential enemy. Hence, the weak state tends to refer a minimal state.

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<sup>1</sup> Boaventura S Santos, ‘Globalizations’ (2006) 23 Theory, Culture & Society < [http://www.boaventuradesousasantos.pt/media/pdfs/Globalizations\\_Theory\\_Culture\\_and\\_Society\\_2006.PDF](http://www.boaventuradesousasantos.pt/media/pdfs/Globalizations_Theory_Culture_and_Society_2006.PDF) > accessed 2 December 2015

<sup>2</sup> *ibid.*

- Consensus of liberal democracy, stresses that civic and political rights have an absolute priority over social and economic rights. Free elections and free markets are two sides of the same coin: the common good achieved through actions of utilitarian individuals involved in competitive exchanges with the minimum of state interference.<sup>3</sup>
- Consensus of the primacy of the rule of law and judicial system, establishes a new legal framework suited to the needs of the economic and social model based on privatisation, liberalisation and market relations. This new legal framework is considered as an independent and universal mechanism that is accepted commonly. Arbitration is the well-fitted mechanism to that description.

Hence, the Washington consensus has an important place that has brought us to where we are today.

The clear and simple notion of globalisation should be viewed as an ideological, economic and political move. One transformation frequently associated with the process of globalisation is the compression of time and space or, rather, the social process by which phenomena accelerate and are spread throughout the world.<sup>4</sup> Although apparently monolithic, this process combines highly differentiated situations and conditions and, because of this, cannot be analysed independently of the power relations that respond to the different forms of temporal and spatial mobility. On the one hand, there is the global capitalist class, which controls the space-time compression and is capable of transforming it in its favour. On the other hand, there are other classes and subordinate groups who do not control the space-time compression in global society.

Through the phenomena of globalisation, the transformation of social reality has led us into a new period in which imperialist rivalries between the hegemonic countries, after causing two

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<sup>3</sup> Ibid, 394.

<sup>4</sup> Ibid.

world wars, have disappeared giving rise to interdependence between the great powers, cooperation and regional integration. Putting aside deep political rifts, hegemonic countries and/or classes have new various mechanisms i.e. selective military intervention, manipulation of international aid, multilateral agencies such as the World Bank and the International Monetary Fund (IMF). It becomes evident that the dominant characteristics of globalisation are the characteristics of hegemonic globalisation. Therefore, a crucial distinction must be made between hegemonic globalisation and counter-hegemonic globalisation. Conflicts between capital and labour are a good example to display two hegemonic sides of globalisation. As a result, there is no institutionalised global labour market since labour has become a global resource. Considering the importance of the democratic and progressive concept of participatory democracy as an embryo of counter-hegemonic globalisation, there is an alternative to hegemonic, neoliberal, top-down globalisation, which is counter hegemonic solidarity and bottom-up globalisation. From now on, what we call global and globalisation cannot but be conceived of as the provisory, partial and reversible result of a permanent struggle between two modes of production, indeed, between hegemonic and counter-hegemonic globalisation.

All problems, some already mentioned above, have been blamed on 'globalisation' from global terrorism to world music, which has become so loose as to be almost meaningless. Globalisation tends to refer to a number of simultaneous and connected processes e.g. removal of trade barriers, harmonisation of the rules. However, there is no question that some of these processes have contributed to the power of capital and the corresponding loss of citizen's ability to shape their own lives as well as generating international debt, inequality and environmental destruction. Problems have arisen by a clash between 'globalism' and 'internationalism'. It is very difficult to state where globalism starts and where internationalism ends. Once the clash between the two terms is transcended in terms of their scope and

application, it will be clearer which one will be applicable in order to overcome the problems and to regulate global issues. In some respects, the world is suffering from a deficit of globalisation, and a surfeit of internationalism.<sup>5</sup>

Although there is not such a clear-cut definition, this thesis adopts that internationalism implies interaction between nation states whereas globalism denotes interaction beyond nation states, unmediated by state. For example; the powers of the United Nations (UN) are delegated by nation states so that only citizens' concerns are those that the nation state is prepared to discuss. What if the nation state is repressive, unaccountable or unrepresentative? The nation state acts as a barrier between us and the bodies charged with resolving many of the problems affecting us. As seen in the example of the UN, globalisation has been forced to give way to internationalism.

The power of globalisation bypasses governments and their usual political processes, to shape global futures directly by changing the decisions which govern the daily pattern of our lives. Internationalism alone appears to be an inadequate mechanism. "Individuals"<sup>6</sup> who shares same interests and stakes, whose class interests extend beyond the state, are left without influence over the way the global political economy develops. As a result, this thesis' argument is surely not to overthrow globalisation but to capture and use it as a vehicle for humanity's first global democratic revolution.

A crucial task is to discover how the scope and application of globalisation and internationalism will be determined or what parameter should be taken and which one is applicable. This thesis employs the difference between local issues and global issues as a parameter for the applicability of the globalisation and internationalism. According to the Global Risks Report 2016<sup>7</sup>, potential global issues and their interconnections are classified under five categories

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<sup>5</sup> George Monbiot, *The Age of Consent: A Manifesto for a New World Order* (Flamingo, 2003).

<sup>6</sup> This thesis conceptualises "the individuals" in the above-mentioned context as global citizens.

<sup>7</sup> See the Global Risks Landscape 2016 and the Global Risk Interconnections Map 2016 respectively at Appendix 3 and 4.

which are economic, environmental, geopolitical, societal and technological. In terms of the likelihood of global risks, these global issues are prominent: large scale involuntary migration, extreme weather events, failure of climate-change mitigation and adaptation, interstate conflict, unemployment and underemployment, data fraud and theft, water crisis and illicit trade.<sup>8</sup> The existence of global civil society as a platform of global issues should not be kept away from the analysis of the difference of global and local issues. The global civil society forms a basis for global issues through the range of globalising forces which are integrating the material, political, social and cultural life of so many individuals on the planet while disintegrating previously embedded forms of socio-economic and political mechanism that is 'internationalism'.

Unlike the conventional focus of International Relations theories which are based on inter-state systems, the transition from (Westphalian) international political system towards the global civil society has to be explained through social forces. This transformation involves a dialectical interplay between social forces. The global civil society is founded upon the global political economy that have historically specific yet changing ensemble of social structures and social forces.<sup>9</sup> Social forces lead to the internal and external restructures and changes of the state and civil society in response to regulatory impacts of global issues. For example: the formal system of state sovereignty appears to have been cumulatively undermined by global trade which has pervasive and deep-rooted economic integration and transformation. Through this transformation and integration social forces reflect a crisis of the existing world order and challenge hegemonic discourses in the study of political economy and international relations.<sup>10</sup> Hence, in order to respond to questions of how to regulate global issues, the configuration of an emerging world order is important and prerequisite. As a result, the most important aspect

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<sup>8</sup> Ibid.

<sup>9</sup> Stephen Gill, *Gramsci, historical materialism and international relations* (Cambridge University Press 1993)

<sup>10</sup> Ibid.

of the new epoch<sup>11</sup>, referring to conclusion of Chapter 4, is that social relations and social structure are in a period of extended and deep-seated transformation on a global scale.

## **2 Analysis of Development of the Global Economy**

Globalisation appears to be gathering more and more momentum like a snowball rolling down a steep mountain. An important question asked is not whether globalisation will continue but through what global hegemonic social forces and at what pace. Globalisation has increased the integration and interaction among the “Individuals” as in the concept of global citizens who take the same breathes in the atmosphere of our planet. As a result, the “Individuals” are becoming ever more dependent on one another for the common needs of daily life. The logic of this movement towards one world is one law in those areas wherein uniformity is necessary and convenient. This thesis not only takes into account the legal analysis of the global commercial law but also the sociological analysis in order to evaluate accurately the global political economy. Sociological factors ought to be considered when examining the role and significance of LM, in other words the global commercial law, since it developed out of the exigencies of the global political economy. For example; the revolution of global communication technology, the dramatic increase of global corporations, the massive growth of global financial flows and the scope of the influence of the global economic crisis.

Examining the significance of LM plays a key role as it provides a common language and business culture which enables merchants, from diverse legal and political systems, to speak to one another in a relatively fair, predictable and secure environment. LM’s role is therefore integral and essential to the restructuring of the global political economy taking place through deeper transformations in local and global political and economic relations. A bullet point in

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<sup>11</sup> “The global political economy requires us to move on in a new historical bloc, namely a global order, to regulate global trade as well as other global issues.”

this context is that what stage the evolution of the global society is in at the beginning of the 21<sup>st</sup> century. In order to take and assess the real picture of global civil society, the sociological analysis is crucial and indispensable.

Within the sociological analysis, global economic forces are prominent, bearing in mind that the global civil society cannot be explained with a single factual argument or factor. Global trade is an important global issue through which the global economic integration and interdependency has increased immensely especially in the last two decades in the context of globalisation. As a number of countries have become more open to global economic forces, economies have been transformed and oriented into an emerging global system of production and exchange in which knowledge, communication and finance play a more decisive role. This global economic integration has emphasised all the stride of economic forces such as enhanced productivity, reduction of transaction costs and trade barriers, and the development from domestic and regional to world markets.

The Fordist mode of production is a good example to indicate how influential economic forces are to alter the political and economic structure of societies. Henry Ford was once a popular symbol of the transformation from an agricultural to an industrial, mass production and mass consumption economy. Fordism refers to mass consumption combined with mass production to produce sustained economic growth and widespread material advancement. This sums up entirely the influences of economic forces at the Fordist modes of production, “twice in this century [the auto industry] has changed our most fundamental ideas about how we make things. And how we make things dictates not only how we work but what we buy, how we think, and the way we live.”<sup>12</sup>

Antonio Gramsci’s criticism of the Fordist mode of production describes well its impacts on societies:

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<sup>12</sup> James P Womack, Daniel T Jones and Daniel Ross, *The Machine that Changed the World* (Free Press 1990)

*Fordism replaces in the worker the old psycho-physical nexus of qualified professional work, which demanded active participation, intelligence, fantasy, and initiative, with automatic and mechanical attitudes. This is not a new thing, it is rather the most recent, the most intense, the most brutal phase of a long process that began with industrialism itself. This phase will itself be superseded by the creation of a new psycho-physical nexus, both different from its predecessors and superior. As a consequence, a part of the old working class will be eliminated from the world of work, and perhaps from the world.*<sup>13</sup>

Global economic forces have positive and negative impacts in the global political economy. Global trade has grown extensively by globalisation. The globalisation contributes to the increasing integration of economies around the world through the movement of goods, services and capital across borders with reduction of barriers to the global trade such as tariffs, export fees and import quotas. Through technological advances, global transactions have been made easier and quicker. It refers to an extension beyond national borders of the same market forces that have operated at all levels of human economic activities such as village markets, urban industries and financial centres. Greater imports offer consumers a wider variety of goods at lower prices, providing strong incentives for domestic industries to remain competitive while exports stimulate job creation as industries sell beyond their borders. Global trade promotes economic resilience and flexibility as well as stimulates foreign direct investment which would be a source of employment for the local workforce and could bring along new technologies, thus increasing productivity levels.

To reach the level where the global trade is in, contributions of integrative feature of trade agreements could not be denied. Some of the regional trade agreements are striking, particularly when revealing that these organisations are not merely economic but also political.

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<sup>13</sup> Fred Thompson, 'Fordism, Post-Fordism and the Flexible System of Production' (1998) < [http://www.willamette.edu/~fthompso/MgmtCon/Fordism\\_&\\_Postfordism.html](http://www.willamette.edu/~fthompso/MgmtCon/Fordism_&_Postfordism.html) > accessed 25 August 2016, citing Antonio Gramsci 'Americanismo e Fordismo' (1949).



The foremost regional trade agreements which play a crucial role on the growth and integration of the global trade are the European Union (EU), the North American Free Trade Agreement (NAFTA) and the Shanghai Cooperation Organisation (SCO). The Transatlantic Trade and Investment Partnership (TTIP) which is currently undergoing negotiations, will be the major and foremost regional trade agreement when it is finalised. The TTIP is a proposed trade agreement between the EU and United States with the aim of promoting trade and multilateral economic growth.

These are countless indicators that illustrate how goods, capital and people have become more globalised through global economic forces:<sup>14</sup>

- The value of global trade (goods and services) as a percentage of world Gross Domestic Product (GDP) increased from 42.1 per cent to 62.1 per cent in 2007.
- Foreign Direct Investment enhanced from 6.5 per cent of world GDP in 1980 to 31.8 per cent in 2006.
- The share of world merchandise exports in the world's GDP was 10 per cent in 1960 whereas it climbed to 35 per cent in 2006.
- The stock of global claims (primarily bank loans), as a percentage of world GDP, increased from roughly 10 per cent in 1980 to 48 per cent in 2006.
- The number of minutes spent on cross-border telephone calls, on a per-capita basis, increased from 7.3 in 1991 to 28.8 in 2006.
- The number of foreign workers grew from 78 million people (2.4 per cent of the world population) in 1965 to 191 million people (3.0 per cent of the world population) in 2005.

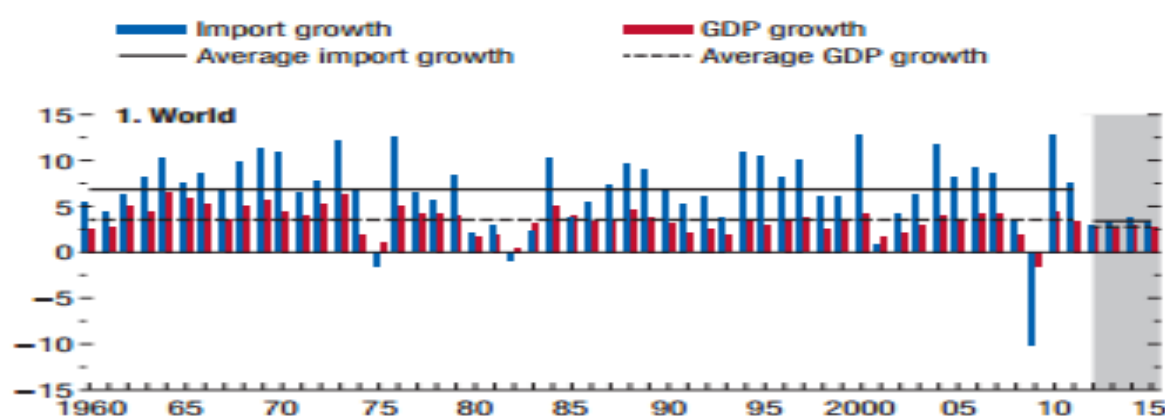
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<sup>14</sup> International Monetary Fund, 'Globalisation: A Brief Overview' (2008) <  
<http://www.imf.org/external/np/exr/ib/2008/053008.htm>> accessed 26 August 2016.

The growth in the global markets has helped to promote efficiency through competition, providing greater opportunities for people to tap into more diversified and larger markets around the world. Joseph Stiglitz, a Nobel laureate and frequent critic of globalisation, has nonetheless observed that globalisation "has reduced the sense of isolation felt in much of the developing world and has given many people in the developing world access to knowledge well beyond the reach of even the wealthiest in any country a century ago."<sup>15</sup>

However, the integration and interdependency of global social forces do not only corporate on the growth of the global trade but also on the decline of the global trade whose influences has been observed through the global crisis of 2008. It should be noted that global economic crisis are also a sign of the global financial and economic interaction and integration, thereby spreading and then influencing swiftly all over the world. The decline in real trade growth since 2012 has been remarkable, especially when set against the historical relationship between growth in global trade and global economic activities as it is seen in Figure 1.

**FIGURE 1: World Real Trade and GDP Growth in Historical Perspective<sup>16</sup>**



<sup>15</sup> Ibid, citing Joseph Stiglitz 'Globalisation and Its Discontents' (2003) (Penguin 2003).

<sup>16</sup> International Monetary Form, 'World Economic Outlook' (2016) < <http://www.imf.org/external/pubs/ft/weo/2016/02/pdf/text.pdf> > accessed 27 August 2016.

Global trade growth has decelerated significantly in recent years. After its sharp collapse and even sharper rebound in the aftermath of the global financial crisis, prolonged sluggish growth in trade volumes relative to economic activities has few historical precedents during the past five decades. While the current economic situation seems less ominous than in 2008, it is proving more difficult to manage. Politicians and policymakers had comprehended their sense of impotence in the face of interconnected global challenges as trust in political leadership is at an all-time low just when the need for decisive political action is at an all-time high.<sup>17</sup> Due to insufficient and ineffective political and economic actions taken within existing world order, most of the downside adjustment has fallen on debtor countries and working families, employment and welfare provision under constant pressure by austerity measures. Conversely, governments offered generous bailouts for banks that had brought on the 2008 global financial crisis while leaving ordinary citizens largely to fend for themselves. As a consequence, many protests all over the world were simultaneously organised against the ineffective, unfair and irrelevant measures taken by the existing world order.

Having reflected on the scope and the influences of the global crisis in the global political economy, it would be incomplete not to mention the negative effects of globalisation and its economic forces. Growing discontent to globalisation and its policies makes us consider why many people are so hostile to it despite the fact that globalisation would increase overall wellbeing. Even, large segments of the population in advanced countries have suffered and as a result, tens of millions in the advanced countries have joined globalisation's opponents in the advancing countries. For example; the bottom 90 percentage of Americans has endured income stagnation for a third of a century.<sup>18</sup> According to Figure 2, in terms of the income distribution

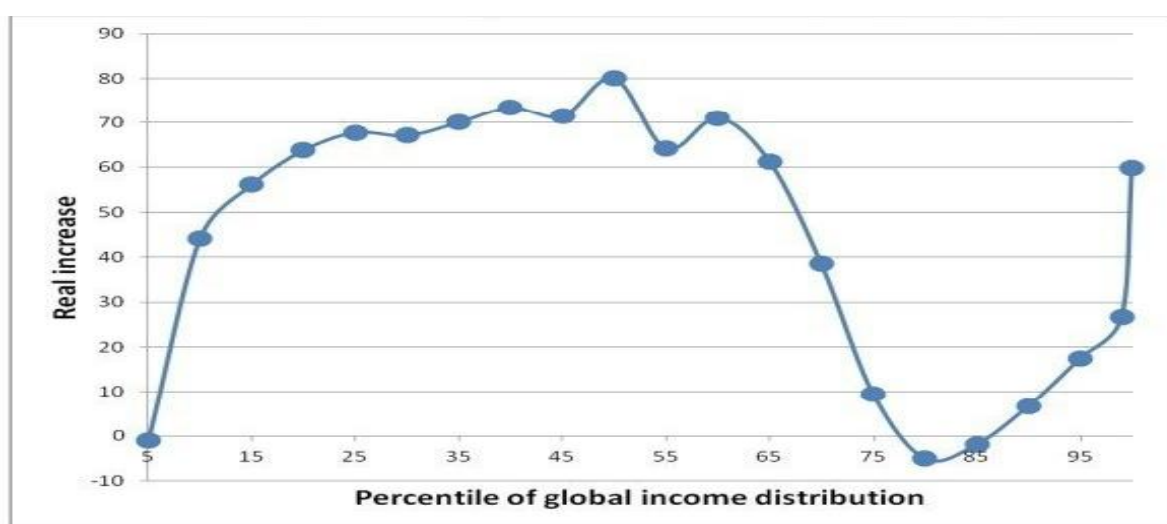
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<sup>17</sup> United Nations, 'Trade and Development Report, 2016' (2016) < [http://unctad.org/en/PublicationsLibrary/tdr2016\\_en.pdf](http://unctad.org/en/PublicationsLibrary/tdr2016_en.pdf) > accessed 8 July 2016.

<sup>18</sup> Joseph E Stiglitz, 'Why we need new rules to tame globalisation' (2016) < <https://www.weforum.org/agenda/2016/08/joseph-stiglitz-why-we-need-new-rules-to-tame-globalization-d7c8fc88-5ea4-4b6e-9540-01bc983274cd> > accessed 12 September 2016.

from 1988 to 2008 the most benefitted category was the global 1 per cent –the world’s plutocrats – and the middle class in newly emerging economies. The category who gained little or nothing was the bottom and middle classes in the world.

**FIGURE 2: Change in real income between 1988 and 2008 at various percentiles of global income distribution (calculated in 2005 international dollars)<sup>19</sup>**



The prominent impacts and consequences of the global inequality are:

- The UN’s Human Development Report notes that there are still around 1 billion people surviving on less than \$1 per day – with 2.6 billion living on less than \$2 per day.<sup>20</sup>
- Despite a global surplus of food, 840 million people are officially classified as malnourished as they lack the money required to buy it.<sup>21</sup>
- One hundred million children are denied primary education.<sup>22</sup>

<sup>19</sup>Branko Milanovic, *Global Inequality: A New Approach for the Age of Globalisation* (Harvard University Press, 2016)

<sup>20</sup> International Monetary Fund (n 14).

<sup>21</sup> United Nations Food and Agriculture Organisation, ‘The State of Food and Agriculture 2002’ (2002) < <http://www.fao.org/docrep/004/Y6000E/y6000e00.htm> > accessed 11 September 2016.

<sup>22</sup>George Monbiot, *The Age of Consent: A Manifesto for a New World Order* (Flamingo, 2003), citing The Organisation for Economic Cooperation and Development, ‘Preparing for the World Summit: Some Information about Sustainable Development’ (2002).

- One third of the people of the poor world die of preventable conditions such as infectious disease, complications in giving birth and malnutrition.<sup>23</sup>
- One third of the people of the poor world has also insufficient access to fresh water as a result of underinvestment, pollution and over-abstraction by commercial farms.<sup>24</sup>
- Climate change caused by emissions of carbon dioxide and other gases is further reducing the earth's capacity to feed itself through the expansion of drought zones, rising sea levels and the shrinkage of glacier-fed rivers as a result of the rich and powerful world's governments have refused to agree to a reduction in the use of fossil fuels sufficient to arrest it.
- According to the Oxfam report, 62 of the richest billionaires own as much wealth as the poorer half of the world's population as seen in Figure 3. Despite the global economic crisis in 2008 and its impacts on global trade, mentioned above, this dropped from 388 in 2010. The report calls for urgent action to deal with a trend showing that 1% of people own more wealth than the other 99% combined.<sup>25</sup> Consequently, a three-pronged approach is needed according to the report: a crackdown on tax dodging; higher investment in public services; and higher wages for the low paid. Accordingly, the estimated loss of \$14 billion in tax revenues would be enough to pay for healthcare for mothers and children that could save 4 million children's lives a year and employ enough teachers to get every African child into school.<sup>26</sup>
- One in nine people in the world go to bed hungry every night<sup>27</sup>

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<sup>23</sup> *ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> Larry Elliott, 'Richest 62 people as wealthy as half of world's population, says Oxfam' (2016) <<https://www.theguardian.com/business/2016/jan/18/richest-62-billionaires-wealthy-half-world-population-combined>> accessed 24 September 2016.

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.*

**FIGURE 3: The Wealthy few<sup>28</sup>**



This could be made into a very long list to indicate that the existing world order is partly as a result of this dictatorship of vested interests, partly through corruption and misrule, and inequality and destructiveness of the present economic system. Therefore, the prosperity promised by the rich world to the poor fails perpetually to materialise. Due to the neoliberal economic policies that have wrote the rules of the game to advance the interests of the rich and powerful at the expense of everyone else, it's time to change the rules of the game which must include measures to tame globalisation.<sup>29</sup> However, the problem is not globalisation but how to manage the process of globalisation.

Along the process of globalisation, numerous organisations and institutions have emerged for the international cooperation and coordination.

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<sup>28</sup>ibid.

<sup>29</sup> Stiglitz (n 18).

### **3 International Institutions of the Existing World Order**

International institutions embody rules to facilitate the expansion of the dominant economic and social forces. International institutions and rules are generally initiated and then implemented by the state which establishes the hegemony within the inter-state structure of power. The rules governing world monetary and trade relations are particularly significant to promote economic expansion and development. International organisations and institutions' reflections and impacts on the global political economy are vast and sometimes immeasurable. One of their main aims is to develop the world trade, eliminating barriers and obstacles that the world trade has incurred to. As a result of the international organisations' endeavour, some mechanisms have been formed in order for the development of the global trade.

Arbitration is the one of those substantial mechanisms when examining the benefits of arbitration especially from macro perspective by asking these questions:

- How does the commercial arbitration mechanism affect society as a whole rather than just the parties tied to the contract?
- Do laws and treaties that make the commercial arbitration agreements and awards enforceable promote economic growth?
- Do they enhance global trade?

Avoiding unnecessary repetitions as these questions have been answered previously in this thesis after the ratification of the New York Convention in 1958 enforcing arbitration agreements and awards have promoted both the economic growth and the global trade with contributions of UNCITRAL<sup>30</sup> and UNIDROIT<sup>31</sup>.

The important question here is why and to what extent international institutions and organisations have been required in the global political economy along the globalisation

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<sup>30</sup> The United Nations Commissions on International Trade Law

<sup>31</sup> The International Institute for the Unification of Private Law

process. This question is becoming more important to analyse how responsive institutions of the existing world order have been to these global problems to find formulations for global issues. In order to seek an answer to global issues, these are the salient institutions within the existing world order.

### **3.1 United Nations**

The United Nations (UN) was conceived in 1941 by the United States, the United Kingdom and the Soviet Union as the Second World War progressed. In June 1945, fifty nations signed the foundational treaty of the UN, known as the UN Charter, with a purpose to promote peace, human rights and international law, the economic and social advancement of all people and to prevent another World War.<sup>32</sup> The problem with the post-war settlement is that those with the power decide what is right. This concern reflects in the constitution of the UN, which is the United Nations Security Council. There are fifteen members of the council, of which ten have temporary seats (held for two years and then passed to another state) and five permanent members. The permanent members are the United States, the United Kingdom, Russia, China and France. Each of the five permanent members has the power of veto: no decision can be taken by the Security Council unless all five have approved it. The truth is that there is no point in preparing a resolution for other member states due to threat of veto which any of the permanent members will implement.

The five permanent members exercise the power of veto not only over the business of the UN Security Council, such as delivering peace, international justice and human rights, but also over substantial change within the entire organisation.<sup>33</sup> For example; any one of the five permanent members can block the appointment of the UN Secretary-General, the election of judges to the

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<sup>32</sup> United Nations, 'Charter of the United Nations' (1945) < <http://www.un.org/en/sections/un-charter/preamble/index.html> > accessed 28 September 2016

<sup>33</sup> United Nations, 'Chapter XVIII: Amendments' (1945) < <http://www.un.org/en/sections/un-charter/chapter-xviii/index.html> > accessed 28 September 2016



International Court of Justice, and the admission of a new member to the United Nations. The special powers of the UN Security Council have rendered the UN General Assembly functionless because 188 member states do not occupy permanent seats on the Security Council and have no real powers about how the world should be run. The problem with the way the Security Council has been established is that the five permanent members who possess power cannot be held to account by other member states.

The UN also has a global responsibility to represent the common interests of all the people of the World whereas the UN is the platform only open to the representation of national states, restraining the way in which its members treat their own citizens. This mechanism of the UN globally does not work out well. Defence spending is an obvious example that most countries from democratic superpower to tin-pot military dictatorship spend a fortune on unnecessary weapons instead of spending on public health and education. Member states of the UN will not unite to condemn this imposition because the five permanent members are the world's five biggest arms dealers and indirectly responsible for exacerbating many of conflicts that the Security Council is supposed to prevent. The five permanent members which possess the exclusive power to decide how threats should be handled are the five nations which present the gravest threat to the rest of the world. Hence, the UN is inherently incapable of representing the common interests of all the people of the world.

This democratic deficit of the UN is not covered up by the representation of the non-governmental organisations (NGO). The UN's Economic and Social Council, for example, has given consultative status to 1500 NGOs. In 2000, the UN hosted a Millennium Forum of NGOs, whose declaration was adopted as an official UN document and whose representative became an official delegate at the UN Summit.<sup>34</sup> Permitting NGOs to represent the people of the earth

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<sup>34</sup> Monbiot (n 22), citing Gore Vidal *Perpetual War for perpetual Peace: How we got to be so hated – causes of conflict in the last empire* (Thunder's Mouth Press, 2002).

would be a disaster for global democracy: everybody calling itself an ‘NGO’ must be permitted to attend; if not, some must determine who can and who can’t attend.

As a result, the UN is, by definition, tyrannical.

### **3.2 Bretton Woods System: International Monetary Fund and World Bank**

Before moving on to the other salient institutions, it is important to mention the Bretton Woods system, 1944. This system’s aim was to further liberalise trade and establish neo-liberal order around the world. The Bretton Woods agreement sets up a system of rules, institutions and procedures to regulate the post-war monetary system. Today the agreement is perceived as the rich world’s solution to the poor world’s problems, but its principal concern was the reconstruction of Europe after the second world war. The Bretton Woods system established two international institutions that still play a powerful role today: International Monetary Fund (IMF) and World Bank.

The IMF and the World Bank predominantly adopt and operate in line with neo-liberal principles.<sup>35</sup> Countries that seek financial support in those institutions must commit themselves to neo-liberal principles if they wish to receive appropriate financial assistance. Both institutions are supposed to assist impoverished nations to build and defend their economies but the majority of their clients have fallen much further in debt than they were before these institutions intervened. Indeed, it is demonstrable that the nations which have most obediently followed their prescriptions are among those which have suffered the most violent economic disruptions. For example; between 1980 and 1996, the nations of sub-Saharan Africa paid twice the sum of their total debt in the form of interests, but they still owed three times more in 1996 than they did in 1980.<sup>36</sup>

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<sup>35</sup> David D Driscoll, ‘The IMF and the World Bank – How Do They Differ?’ (1996) < <https://www.imf.org/external/pubs/ft/exrp/differ/differ.htm> > accessed 16 September 2016.

<sup>36</sup> National Catholic Reporter, ‘Millions of the World’s Children are Desperate’ (2000) < [http://natcath.org/NCR\\_Online/archives2/2000d/122200/122200m.htm](http://natcath.org/NCR_Online/archives2/2000d/122200/122200m.htm) > accessed 2 October 2016.

The intended purpose of these institutions is to maintain global economic stability by helping countries which have difficulties balancing payments, stabilising exchange rates, promoting economic growth and employment and workers' incomes. These duties would prevent the economic difficulties faced by one nation from infecting other nations in order to obstruct a global economic slump. As Joseph Stiglitz stated, they have done precisely the opposite especially in the past few years. Those institutions have imposed policies designed to help the rich world's private banks and financial speculators rather than the poor world's struggling economies. Accordingly, both institutions reflect the interests and ideology of the Western financial community, instructing policies: the control of inflation ahead of other economic objectives; immediately removing barriers to trade and the flow of capital; liberalise banking system; reduce government spending on everything except debt repayments; and privatisation of assets. Besides, both institutions as well as the World Trade Organisation (WTO) aims at the removal of tariffs and duties in order to ensure free export and import between all participating countries. In practice, however, as many critics observe, the highly developed countries, the US and EU, have been allowed to maintain high import duties and quotas.<sup>37</sup> By doing so, it blocs export from poorer regions of the world as products become more expensive in the destination countries. This is the case particularly in regard to agricultural subsidies in developed countries. As Cheru suggests, Africa's growing dependence on imported foods not only creates dangerous dependencies on products which cannot be grown on the continent, but it may also lead to political blackmail where African governments are being pressured to relinquish their sovereignty 'by opening their books to the International Monetary Fund, dismantling their state-owned institutions and devaluating their currencies'.<sup>38</sup> The removal of tariffs and duties from developing countries, combined with the subsidies, are a great

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<sup>37</sup> Monbiot (n 22).

<sup>38</sup> Fantu Cheru, *The silent revolution in Africa* (Zed books, 1989) 5.

advantage for developed countries which can further expand their markets on a global scale while maintaining protectionist policies.

The poor and colonised world whose wealth has been plundered for 500 years owes £382 billion every year to the rich world, which might have been used to feed the hungry, to house the poor, to provide healthcare, education, clean water, transport and pensions for people who have access to none of these amenities.<sup>39</sup> Joseph Stiglitz, describes John Maynard Keynes as an ‘intellectual godfather of the IMF and the World Bank’ and remarks that ‘Keynes would be rolling over in his grave were he to see what has happened to his children’.<sup>40</sup>

It can be also seen that these institutions are predominantly dominated by developed countries when examining the constitutions of these institutions such as the voting system whereby a country with the biggest capital has the greatest say in decision-making. ‘G8’ nations – the United States, Canada, Japan, Russia, The United Kingdom, France, Germany and Italy possess forty-nine per cent of the votes within the IMF<sup>41</sup> and forty-eight per cent of the votes within the World Bank.<sup>42</sup> The allocation of votes by each organisations in the World bank breaks down as follows: the G8 has 45.9 per cent of the vote in the International Bank for Reconstruction and Development; 55.3 per cent in the International Finance Corporation; 48.6 per cent in the International Development Association; and 43.3 per cent in the Multilateral Investment Guarantee Agency.<sup>43</sup> While these figures displays that the power of eight of their 189 members is disproportionate, it could turn a decision against the G8 countries if the rest of the world pool its votes.

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<sup>39</sup> George Monbiot, *The Age of Consent: A Manifesto for a New World Order* (Flamingo, 2003).

<sup>40</sup> Joseph E Stiglitz, *Globalisation and its Discontents* (Norton, 2003)

<sup>41</sup> International Monetary Form, ‘IMF Members’ Quotas and Voting Power, and IMF Board of Governors’ (2016) < <https://www.imf.org/external/np/sec/memdir/members.aspx> > accessed 30 September 2016.

<sup>42</sup> World Bank, ‘Voting Power of Member Countries’ (2016) < <http://www.worldbank.org/en/about/leadership/votingpowers> < accessed 1 October 2016.

<sup>43</sup> *ibid.*

Beyond that, the constitution of the IMF<sup>44</sup> and the World Bank<sup>45</sup> ensures that all major decisions like a substantial resolution or amending the way they operate require an eighty-five per cent majority. The US alone possesses seventeen per cent of the votes in the IMF<sup>46</sup> and averaged across its agencies, eighteen per cent of the votes in the World Bank<sup>47</sup>. In other words, the US can veto any substantial resolution put forward unless it is not of benefit to the economy of the US, even if all the other members support it. Moreover, the managing director of the IMF is always a European and his deputy is always a North American while the president of the World Bank is always a citizen of the United States, nominated by the US Treasury Secretary.<sup>48</sup> Therefore, the World Bank and the IMF are as rigidly controlled as the UN.

As shown above, the promotion of neoliberal economic policies through the international institutions such as the WTO, IMF and the World Bank further consolidates the inequalities between people having different origin and relationship in capitalism. Through those institutions, rich people with the greatest capital can influence the world system in the way that serves them the best. Those institutions strengthen the dependence and limit the development of poor people around the globe. The underdevelopment of the world's poorest areas is not a result of their presumably backwardness and lack of technological advancement but rather it is an outcome of dependency relationship in the capitalist relationship because even people from developed countries suffers from this system. As the international institutions have forced to liberalise global trade in the way mentioned above, it allows global companies and corporations to make favourable deals in the world.

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<sup>44</sup> International Monetary Fund, 'IMF Articles of Agreement: Articles XXVIII: Amendments' (2016) < <https://www.imf.org/external/pubs/ft/aa/> > accessed 3 October 2016.

<sup>45</sup> World Bank, 'International Bank for Reconstruction and Development Articles of Agreement: Article VIII' (2016) < <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20049557~pagePK:51123644~piPK:329829~theSitePK:29708,00.html> > accessed 2 October 2016

<sup>46</sup> International Monetary Fund (n 44).

<sup>47</sup> World Bank (n 45).

<sup>48</sup> Monbiot (n 39).

## 4 Status of Corporate Power in the Global Political Economy

Numbers and activities of non-state actors have increased with the globalisation process. Although the notion of non-state actors remains conceptually problematic, that comprises any actor that is not a state: including international organisations, Non-Governmental Organisations (NGOs), multinational corporations, general public, professional associations and commercial lobbying groups as well as criminal and terrorist networks. Non-state actors interact with each other as well as governments; operate for profit or public goods by supporting or undermining the state system. Can any single analytical framework accommodate and explain genesis, activities and impacts of such a diverse set of non-state actors? Knowing how complicated to classify non-state actors within the existing world order in terms of their activities and impacts, this requires a new definition and evolvement of subject of law particularly for global issues, which will be analysed in the next chapter. (Neo)-Liberalist doctrine ostensibly overcame this problem, applying the distinction between private and public sphere. The private sphere that non-state actors and their authority relationship are based within is defined as “neither states, state-based, nor state-created”. Accordingly, authority relationship can be examined only in a recognisable issue sphere: either public or private sphere. Considering causes and consequences of the attainment of legitimate power by non-state actors, the private sphere directly or indirectly operates for profit: firms, business lobbies, industry associations and other corporate actors.<sup>49</sup>

While states, only subject of international law within the existing world order, have become ever more willing to regulate their citizens, they have become ever less willing to regulate global corporations. Through the economic forces of globalisation and neoliberal policies, the

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<sup>49</sup>Tim Buthe, ‘Governance through Private Authority: Non-State Actors in World Politics’ (2004) 58(1) *Journal of International Affairs* < [http://people.duke.edu/~buthe/downloads/Buthe\\_JIA\\_corrected.pdf](http://people.duke.edu/~buthe/downloads/Buthe_JIA_corrected.pdf) > accessed 9 August 2016, citing A C Cutler, V Haufler and T Porter *Private Authority and International Affairs* (Sunny Press, 1999).

significance of corporate power has increased massively in relation to the emergence of private authority in global governance. However, the importance of the private authority in the global political economy is obscure and little is understood by theories of international relations. This is why this chapter also focuses on the special status of corporate power.

In order to display the special status of corporate power, the capacity of global corporations to breach fundamental norms of international law is essential as to their invisibility for not incurring legal liability. Global corporations have become as powerful as some of states in which they operate. For example; the combined profits of the 17 largest global corporations exceeded the combined Gross National Product of the world's 41 poorest nations in 1989.<sup>50</sup>

As the International Court of Justice stated for a case concerning military and paramilitary activities in and against Nicaragua in 1986<sup>51</sup>, the norm of non-intervention embodied a prohibition against any intervention bearing on matters upon which a state is permitted to decide freely. This included the choice of political, economic, social and cultural system as being compatible with the Universal Declaration of Human Rights setting out a catalogue of civil, political, economic, social and cultural rights for which respect is to be promoted by every individual and every organ of society.<sup>52</sup> Within this context, the concept of the state is acknowledged as people living on the specific location, not being a legal entity away from the people. Global corporations may impact adversely upon state's sovereignty - 'freedom of choice' - acting independently of their control. The United States' Bureau of International Commerce has admitted that the global corporations often know more about a country's inner struggle and politics sooner than the government.<sup>53</sup> Thus, they often prefer to deal on their

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<sup>50</sup>Fleur Johns, 'The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory' (1994) 19 Melbourne University Law Review <  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=603243](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=603243) > accessed 15 August 2016.

<sup>51</sup> "The principle of non-intervention involves the right of every sovereign state to conduct its affairs without outside interference . . . it is part and parcel of customary international law.", cited *ibid*.

<sup>52</sup> Universal Declaration of Human Rights 1948, GA Res 217A

<sup>53</sup> Johns (n 50).

own by intervening in or subverting the political processes of host states by contributing directly to political campaigns; bribing local government officials; co-opting local entities; and constructing financial networks to impede host governments' capacity to expropriate or nationalise corporate assets.

Global corporate activities may also significantly limit states' rights to determine their own socio-cultural fates. Corporate power's influence reflects on consumption patterns, employment practices and public attitudes through the production and marketing of their own products worldwide. Domination of the world's media by the global corporations is a significant indication in this regard: up to 84% of radio advertising, 77% of television advertising and 60% of magazine advertising worldwide has been attributed to the global corporations.<sup>54</sup>

The tendency of the global corporate power to intervene in states' political, economic and cultural issues reflects a clear infringement of fundamental human rights in the light of the above-mentioned corporate power. The global corporations directly impact upon people's capacity to exercise their right of self-determination. Consequences of not exercising the right of self-determination has been detrimental globally to people's lives particularly for indigenous people. For example: Edward Callan and Halliburton –two Texas-based global oil companies- invaded lands of the Aguaruna and Huambisa peoples in the Upper Marañon River Basin with the assistance and protection of Peruvian troops.<sup>55</sup> Non-forcible interventions through political, economic and cultural influences by the global corporations are as severe as forcible interventions to impede the capacity of people to exercise their human rights. Albeit there are artificial state boundaries for the global corporations in regard to the global economic forces, international law currently affords no means to restrain infringements. Therefore, human

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<sup>54</sup> *ibid*, citing N Janus, 'Advertising and the Mass Media: Transnational Link Between Production and Consumption' (1981) *Media Culture and Society*.

<sup>55</sup> *ibid*, citing Marc Miller 'State of the People: A Global Human Rights Report on Societies in Danger (1993).



rights laws do not provide individuals with winning ‘trump cards’ against corporate conglomerates.

While the global corporate power has profound influences in the global political economy, status of the global companies lacks concrete presence in international law. As the Spanish proverb summarise it: “Laws, like the spider’s web, catch the fly and let the hawk go free”, the global corporations are more notable in their absence from international legal discourse than in their presence. When examining the anomalous position of global corporate power, it is prominent that the global companies are crucial participants in the creation and enforcement of the global commercial law, seriously challenging the state’s monopoly over legislative and adjudicative functions in global trade. Why then has international law traditionally not recognised the global corporations as an international actor and a legal subject? Does this represent an attempt to underpin an out-dated legal order against forces of change? Or is it merely that international law is not conceptually equipped to deal with these obstreperous entities?

It is important to develop a fuller understanding of the significance of corporate power in the constitution of global political authority. The liberal policies with the support of the existing world order created the private sphere for the global companies which are away from the state’s influences. The capitalist historic bloc has stressed on disembodiment of productive relations from both state and society through the privatisation of the global commercial discipline and has drawn the boundary between the private and public sphere in connection with the liberal doctrine. Through a privileged area for the global corporate activities, the private sphere forms the reconfiguration of the global authority relationship resulting from the contemporary globalisation of productive relations.<sup>56</sup>

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<sup>56</sup> Claire A Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press 2003).

The private sphere has become a large and growing realm in the global political economy, which the framework of the governance for global economic transactions forms an authority structure. Global governance through private authority structure raises problematic and complex questions with respect to accountability. From the perspective of traditional legal theories, the private authority is not accountable the same way as public authority. When combined with state-centric analysis, the public/private separation renders the political significance of the global corporations invisible. The political significance of the global corporations, which are major agents of the private sphere and the key players in the creation and the enforcement of LM, are denied as subjects of the law under conventional legal approaches.<sup>57</sup>

The global corporations' status in international law is generally defined to a particular state as analogous to that of individuals. The traditional rule attributes rights regarding to a global corporation to the state under the laws of which the global corporation is incorporated and in the territory of which it has its registered office.<sup>58</sup> For a corporation operating across many states' territories and many legal systems, difficulties arise through these tenuous, uncertain and inconvenience links between global corporations and states. States of the incorporation and national states of their registered office may have neither the capacity nor the inclination to exercise the power so that the artificiality, inconvenience and potential injustice of this system has been one of the motivating factors for a global regulatory framework. A representative of the United States Government, for example, stated that: "The US Government is not in a position to guarantee that its private sector will [or will not] perform in a [particular] way . . . . Our Government does not have – nor does it wish to have – that type of control over our private sector."<sup>59</sup>

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<sup>57</sup>Ibid.

<sup>58</sup> Barcelona Traction (1970) ICJ 3, para 70

<sup>59</sup> Johns (n 50), citing W Jopley Bennett (US Representative at the 2<sup>nd</sup> General Conference of the UN Industrial Development Organisation) (1975).

Global corporations as a central agent in the generation and development of LM actively engage in defining and functioning the rules of LM and its institutions that constitute private authority. The assumption of a rigid separation of the private/public sphere has engendered the domain of private authority structure that global corporations' role on the creation and enforcement of the global commercial law are substantial. Therefore, LM works to entrench and deepen the paradoxical exercise of public authority by private agencies that, as putative "objects" of the law, remain invisible as legal "subjects". Moreover, the special status of global corporations has caused the disjuncture between commercial practices and law because commercial practices are increasingly recognising the political significance of private actors on the regulation of the global commerce but international law remains steadfastly state-centric.<sup>60</sup> As a result, conventional principles characterising global corporations as nationals of particular states are of limited practical or theoretical utility.

Examined inadequacies of the existing world order with respect to the legal subjects of the global political economy, global issues must be opened up to all groups, including but by no means limited to global corporations, with direct involvement in any field of human affairs. Improved access must be combined with a distribution amongst participating groups of the tools, information and resources necessary for contribution by these groups in order not to replicate the power balances that currently paralyse or silence certain groups in international law. The legal subjects of the global political economy for global issues will be analysed in the next chapter, which is crucial for global order. However, there are plenty of lessons to be learnt from the existing world system but if a global order is not formed for global issues, the global commercial law, LM, is being served and reconfigured as a handmaiden of global capital.

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<sup>60</sup> This was analysed in details by respective section of Chapter 2 and 3.

## 5 The Critical Assessment of Social Forces of the Emerging Global Order

The developments of the global commercial law, LM, ignites the wick of the emerging global order as its existence is integral to the structure of the emerging global order, taking place through deeper transformations in the global political economy by forming juridical formations for the global trade. The global trade is a model and outstanding global issue for other global issues, considered global economic forces has become substantial in the global political economy. The global political economy has ushered in a new era in which globalising social forces are prominent and, interlinked in an integrated set of structures with regard to a global authority structure. The global forces are the interplay between town and country, rich and poor, and war and peace in the global society such as a growing planetary consciousness of ecological and environmental issues. By the capitalist historic bloc, global issues have been spreading influentially being the predominant form of global forces such as marketization and commoditisation which deepens its social and geographical reach.

In the global society, authority relationship and structure appears to be re-concentrated in the global social forces which engender incurring substantial transformation and a global process of restructuring. The global society has been characterised by the growing global integration of production and financial structures, complex communication grids, the rapid innovation and diffusion of technology and the emergence of associated forms of consciousness. Globalising forces have been integrating the material, political, social and cultural life of so many people on the planet, but whilst simultaneously disintegrating previously embedded forms of socio-economic and political organisations.<sup>61</sup> Indicators of this transformation are the globalisation of people driven by the global trade, growing disparities in economic and environmental conditions and recent growth of migratory and refugee movements.

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<sup>61</sup> Stephen Gill, *Gramsci, historical materialism and international relations* (Cambridge University Press 1993)

Globalisation has been termed a multifaceted complex phenomenon that cannot be tackled partly but must be faced by a systems approach constituting and composing the relationship of global forces. A global system must be more resilient, beneficial, legitimate and fair by breaking down all obstacles that are encountered by the global political economy. More global forces can be structured fairly, more people can seize equally the benefits of the global political economy. Such actions are necessary so that problems common to all nations – poverty, global warming, hunger and large scale involuntary migration – can be fought effectively through a global order.

Former Secretary of State Henry Kissinger stated:

*“The need for a global structure has long been evident, but the gap between developed and developing countries – a constant challenge to tranquillity – has continued to widen. The growing reality of our interdependence is in constant tension with the compelling trends of separatism and intense nationalism. . .*

*We live today in a world of many centres of power and contending ideologies; a collection of some 150-odd nations sharing few agreed legal or moral assumptions; an [global] economic system in which the well-being of all peoples is inextricably intertwined; in short, a set of new historical realities in which the challenges of peace, prosperity, and justice have no terminal date and are unending.”<sup>62</sup>*

It reflects a crisis in the existing world order, which challenges hegemonic discourses in theories of international relations and law. In the light of the dominance of the liberal doctrine, the historical dialectic between economics and politics has caused the existing world order to fail to respond to the needs of the realities of the global political economy. What matters to

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<sup>62</sup> L H Hayes, ‘Modern Lex Mercatoria: Political Rhetoric or Substantive Progress’ (1977) 3(2) Brooklyn Journal of International Law  
<[http://heinonline.org/HOL/Page?handle=hein.journals/bjil3&div=17&g\\_sent=1&collection=journals#](http://heinonline.org/HOL/Page?handle=hein.journals/bjil3&div=17&g_sent=1&collection=journals#)>  
accessed 11 January 2016

global commerce, and what the debate about the autonomy of LM from the state is really about, is not the distinction between state and non-state, but rather the distinction between economics and politics.<sup>63</sup> The commercial law is distinguished not from the state but from political law, especially constitutional law and regulatory law, much of which remains traditionally within the nation state.

The global commercial law, LM, plays a vital role because identifying the future direction of global economic force is a prominent component to determine a new global order through which its authority structure should be established by the structure of global forces. Besides, significant structural changes in the existing world order leads to some fundamental alterations in social relations as a result of the interrelationship of the global forces. Therefore, analysis of interrelationships of the global social forces is essential and indispensable in order to establish the role of LM and the structure of a new global order.

### **5.1 Impacts of the Liberal Economic Doctrine on the Global Political Economy**

The Liberal Doctrine posits the natural, neutral, consensual, efficient and private economic exchange in the global political economy. Private economic relations are delineated as the apolitical realm of freedom whereas the public sphere is depicted as the political realm of necessary restriction. However, the liberal ideology of a self-regulating global market did not emerge spontaneously as an organic and natural development but as a product of a complex set of legislative interventions to remove obstacles to economic exchanges. As Karl Polanyi described, it is nothing less than the institutional separation of society into an economic and political sphere.<sup>64</sup>

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<sup>63</sup> Ralf Michaels, 'The True Lex Mercatoria: Law beyond the State' (2007) 14(2) *Ind J Global Legal Stud* <[http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2476&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2476&context=faculty_scholarship)> accessed 10 December 2014

<sup>64</sup> Cutler (n 56), citing 'The Great Transformation: The Political and Economic Origin of Our Time' (1944).

Gramsci also strengthens that the distinction between economics and politics is not an organic one but is merely methodological:

*It is asserted [under liberalism] that economic activity belongs to civil society, and that the State must not intervene to regulate it. But since in actual reality civil society and the State are one and the same, it must be clear that laissez-faire too is a form of State “regulation,” introduced and maintained by legislative and coercive means. It is a deliberate policy, conscious of its own ends, and not the spontaneous, automatic expression of economic facts. Consequently, laissez-faire liberalism is a political programme, designed to change – insofar as it is victorious- a state’s leading personnel, and to change the economic programme of the State itself – in other words the distribution of the national income.<sup>65</sup>*

The separation of economics and politics forms the private sphere in order for economic competition, free enterprise and to ensure the market in commodities, labour and capital. Any bargain can be struck by a buyer or a seller in this case and that without being interrupted by state officials. In fact, in regard to institutional integrity there is no enforcement of just price, no restrictions on usury, no quality or safety standards, no minimum wage and so on within the self-regulating global market.

According to the liberalism, the self-regulating global market as a separate institution leaves risks on consumers of unsafe and false products. But that risk taking should not extend to unknown and unforeseeable risks such as unsafe cars or cars contaminating the air. In this instance, the degree of risk that we live with on our highways and in our environment is a matter for political decision, which matters to national states and its citizens; not only to the market and its buyers and sellers. As a contemporary case of Volkswagen (VW), the German car giant (VW) admitted cheating emissions tests by a huge marketing campaign trumpeting

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<sup>65</sup>Gill (n 61), citing ‘Selections from the Prison Notebooks’ (1971).

its cars low emissions.<sup>66</sup> Whilst the engines of the company's cars emitted nitrogen oxide pollutants up to 40 times above what is allowed in the US, the VW confessed that about 11 million cars worldwide are fitted with the so called "defeat device".<sup>67</sup> As 'art of separation' being drawn by the liberal doctrine between social institutions that leaves the risk of disappointment on one side and the risk of disaster on the other, the global market does not have any mechanism that automatically upholds its institutional integrity.

The liberalism, the art of separation, draws walls between social institutions to create liberty within each institution. Churches, schools, markets and families are some of the social institutions with particular histories. They take different forms in different societies that reflect different understanding of faith, knowledge, commodities and obligations. In each case, institutions are responsive to their own internal logic as well as to systematic logic, which could form tyrannical authority structure through breaking the walls established by the art of separation. The art of separation creates a false tenet of social institutions as if they were occurred through voluntary acts of individuals. In no case, they are shaped wholly by individual agreements because the art of separation is not rooted in or warranted by individual separateness. Global society is an organic and integrated a whole as John Donne stated 'every man is a piece of the planet'.<sup>68</sup> Society might be viewed under the aspect of any institutions but all these interpenetrates one another and constitutes social realities. The separateness between institutions: church and state, civil society and political community, public life and private life, and home and shop is inseparable two in one mysteriously or un-mysteriously.<sup>69</sup>

The false tenet, individual separateness, serves a practical purpose to keep state interference out in institutional spheres since the state has the official authority for using the coercive power.

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<sup>66</sup> Russell Hotten, 'Volkswagen: The scandal explained' (2015) < <http://www.bbc.co.uk/news/business-34324772> > accessed 10 October 2016.

<sup>67</sup> *ibid.*

<sup>68</sup> Michael Walzer, 'Liberalism and Art of Separation' (1984) 12(3) Political Theory < <https://www.sss.ias.edu/files/pdfs/Walzer/LiberalismArtofSeparation.pdf> > accessed 28 January 2016

<sup>69</sup> *ibid.*



It then makes very difficult to recognise other subtle interference as in the private authority structure. This thesis acknowledges that individuals should be free in all sorts of ways but it is not going to happen by separating them from their fellows. What goes on in one institutional setting influences all the others; the same people, after all, inhabit the different settings, and they share a history and a culture. As the walls do not have the clear and distinct character and will be drawn here and there experimentally and wrongly, the line between politics and economics has been wrongly drawn for a long time. Thus, the people suffer from the abuse of the market power.

The separation between the economics and politics maintains a set of rigid distinctions reflecting on and consolidating each other: distinctions between private and public sphere and civil society and the state. The dominant theories of international relations and law are premised upon the liberal “art of separation” wherein markets and civil society are regarded as separate and distinct from politics, governments, and the state. Global economic forces form an essential element in the reconfiguration of political authority resulting from the contemporary globalisation of productive relations. The overwhelming value placed by the liberalism on disembodied productive relations from both state and society through privatisation is refiguring the boundary between private and public authority structures.<sup>70</sup> Taken that global authority is changed in the generation and enforcement of global commercial norms, the private sphere has increasingly been finding its way into the global political economy, which has a significant impact on state-society relations. The liberalism obscures the political significance of private economic power through the association of authority with the public sphere and its disassociation with private activities. The challenge lies in there where political authority stops at the territorial borders of the state, while “economic” relations do not. The material,

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<sup>70</sup> Claire A Cutler, ‘Locating “Authority” in the Global Political Economy’ (1999) 43(1) ISQ <  
<http://www.jstor.org/stable/pdfplus/2600965.pdf?acceptTC=true>> accessed 12 November 2014

ideological and institutional hegemony exercised by the capitalist historic bloc raises crucial problems for locating and identifying “authority” globally.

Besides, the global political economy doesn’t involve only juridical rights and the authority structure but also the allocation of resources and life chances. This is associated with the capacity for human autonomy, freedom, equality and social choice. The nature of these developments indicates contradictions between the logic of globalizing forces and the political conditions of existence for the operation of those forces. With the liberal policies that is generating widespread disillusionment, resentment, desperation and violence, which is reflected in the resurgence of populism, racism, fascism and gang culture in the global political economy. For instance, according to a western financial journalist, the social and economic conditions during the 900-day siege of Leningrad in 1941 were far better than those in the renamed city of St Petersburg in March 1992.<sup>71</sup>

Thus, the structure and relationship of global forces responds to the needs and the realities of the global political economy. The relationship among the global forces is a key element to determine state-society relations being connected with the modes of production. The restructuring of global production and power appear to have begun to transform the basis of political authority, legitimacy and accountability away from the national and towards global levels. Accordingly, the relationship and structure of the global forces must be reconfigured by the global society.

## **5.2 Interaction between Marxist Approach and the Global Political Economy through the Global Forces**

The art of separation has never been highly regarded by Marxism where it is commonly seen as an ideological rather than a practical enterprise. The liberalism draws lines and calls them walls as if they had the material force of brick or stone, but the walls are only lines, one-

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<sup>71</sup> Walzer (n 68).

dimensional, doctrinal and insubstantial. Marxism criticises the liberalism that serves particular and private interests and limits its art of separation to that interests. As institutions of the global society is protected from the state power, they must also be protected from that private interests which forms the power of wealth within the global political economy. Marx' vision of individual and collective self-determination requires the existence of a protected and free space within which freedom of choices can be made so long as wealth and power are walled in and limited. The Marxism's purpose is to focus on the social realities but not on abstract matters. Society remains an organised whole even if its members lose their sense of connection. It is Marxism's goal to restore that sense to bring all members to a new understanding of their connectedness so it enables them to take control of their common life. For Marxism, the art of separation was something to be overcome.

There is scepticism of Marxist ideology. There are stereotypes of bad Marxist ideology practise such as Soviet Russia and Yugoslavia. Here society did not function as Marx suggested. When practiced on a continental scale, the emancipation of the workers has been frustrated by tyrants who corrupted Marx's ideology for their own ends. In addition to that, there is no single school of Marxism or any consensual interpretation of Marxist ideology.

As Gramsci realised, Marxist ideology was forgotten and pushed aside in the global political economy while liberalism and realism rejuvenated themselves. Particularly since the fall of the Berlin Wall in 1989, Marxist ideology lost momentum and has not responded well enough to the needs and the realities of global political economy. There has not been a satisfactory and socialist mechanism to analyse the dynamics of global political economy. The Amsterdam school stressed the importance of an integral and objective social theory at the core of its analysis:

*The relation between society and the state, as well as relations between states as a consequence of their social interaction, has to be placed in the context of socialisation as a pervasive process. The ways in which capital (in the sense of total capital, i.e. , a self-sustaining, quasi-totalitarian universe of competitive accumulation of surplus value) acts as the agent of socialisation while simultaneously constraining its potential (both in the sense of division of labour and in the sense of universal culture/normative structures), has to be clarified and related to other structures of socialisation of community nature – family, nationality, ethnicity – as well as law and state as formal arrangements constitutive of legal/legitimate agents.<sup>72</sup>*

The type of mechanism analysing the social reality needs to be linked to a broader theoretical ground from local or national level to global level with regards to regulation of global issues. The point is to re-read Marx with an altered perspective, laying out Marx's theoretical tools in readiness for the analysis of today's world. In that case, the 'pessimism of reason' helps to overcome the naïve beliefs of a philosophy of history but the 'optimism of will' helps to reconnoitre the world with the eyes of intervening thought.<sup>73</sup>

Progressive self-consciousness is reconstituted through an appreciation of prevailing thought-patterns and the nature and distribution of life-chances.<sup>74</sup> The moment of self-awareness is a form of historical change in the balance of social forces and leads to a more complex and coherent understanding of the social world. As it involves the thought and inter-subjective meanings of individuals who have different forms of self-consciousness and awareness as to the social nature of their action/inaction, social reality is intractable to society and nature, which it cannot be understood fully or completely. The social reality is to a certain extent independent, but nonetheless interdependent with, the process of knowledge production because abstractions

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<sup>72</sup> Gill (n 61) 4, citing Alex Fernandez, Otto Holman, Henk Overbeek and Kees van der Pijl (1991).

<sup>73</sup> Wolfgang F Haug, 'From Marx To Gramsci – From Gramsci To Marx: Historical Materialism and the Philosophy of Praxis' (1999) < <http://www.wolfgangfritzhaug.inkrit.de/documents/GRAMMENXX.pdf> > accessed 25 March 2016

<sup>74</sup> Gill (n 61).

concerning the structural components of such social reality can and must be intellectually produced for explanation to be possible.<sup>75</sup>

With regard to the process of knowledge, the historical dialectic must be approached through Marx's ideas concerning "thought-concrete"<sup>76</sup> and "concrete-real"<sup>77</sup>. Each ideological framework creates its own version of "concrete-real" and "thought-concrete". Marx acknowledged that knowledge is the process of change in which the two 'concretes' are interconnected and are mutually transformed to provide a new synthesis.<sup>78</sup> This method enables theorists to approach a more comprehensive and consistent explanation of the social reality through developing and elaborating the thought-concrete. Going beyond the epistemological approach towards a social ontology is important to avoid lapses into arguments concerning the determinacy of either politics or economics, or some underlying and ultimate causality. As Gramsci remarked of Nicolai Bukharin's Popular Manual of Marxist Sociology that eliminated the dialectical standpoint by introducing a 'metaphysical materialism', by doing so, single or last instance causes are reduced to the philosophy of praxis to something akin to a search for God:

*The philosophy implicit in the Popular Manual could be called a positivistic Aristotelianism, an adaptation of formal logic to the methods of physical and natural science. The historical dialectic is replaced by the law of causality and the search for regularity, normality, and uniformity . . . In mechanical terms, the effect can never transcend the cause or the system of causes, and therefore can have no development other than the flat vulgar development of economism.*<sup>79</sup>

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<sup>75</sup>Stephen Gill, *Gramsci, historical materialism and international relations* (Cambridge University Press 1993).

<sup>76</sup> Which is understanding of the concrete or the significance of social action and structure generated by the process of reflection and thought.

<sup>77</sup> Which determines theory.

<sup>78</sup> Gill (n 75).

<sup>79</sup> Antonia Gramsci, *Selections from the Prison Notebooks* (Quentin Hoare and Geoffrey Nowell Smith ed and trs, ElecBook 1999).

Given the importance of social ontology, it is crucial to recognise that the abstract nature of all thought-processes and knowledge systems are incomplete. Knowledge is also a process of social struggle between hegemonic and counter hegemonic perspectives by arriving at different thought concretes. Marx criticised the hegemonic perspectives within the International Relations and Law for not probing deeply enough into the complex role of ideas and consciousness and the interaction of knowledge systems with the rest of the historical process.<sup>80</sup> Marx calls it as ‘false abstraction’ which are not grounded concretely in history. At this point it emphasizes that the historical materialism is differentiated from empiricism and positivism. A change in thinking is a change in the social totality and thus has an impact on other social processes; a change in the social totality will provoke change in the process of thought. Hence, the process of thinking is part of a ceaseless dialectic of social being.<sup>81</sup>

There is no greater obstacle to socialist practice than the art of separation. The distinction between the economy and politics has served capitalism well ever since the liberal doctrine explored the economy in abstract by emptying capitalism of its social and political content. The realities of capitalism transform certain political issues, struggles over domination and exploitation that historically have been inextricably bound up with political arena, into distinctively economic issues.<sup>82</sup> Hence, this separation is the most effective defence mechanism available to capitalism.

Marxist theory is to shed light on the economic actions by neither ignoring historical realities nor ratifying the separation of economics and politics. It explains precisely how and in what sense capitalism has driven a wedge between the economic and the politic: political issues like the disposition of powers to control production and appropriation or the allocation of social

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<sup>80</sup> Ibid.

<sup>81</sup> Gill (n 75).

<sup>82</sup> Ellen M Wood, ‘The Separation of the Economic and the Political in Capitalism’ (1981) 127 New Left Review I < <https://newleftreview.org/i/127/ellen-meiksins-wood-the-separation-of-the-economic-and-the-political-in-capitalism> > accessed 22 July 2016.

labour and resources have been cut off from the political arena and displaced to a separate economic sphere. Marx's critique of political economy aimed to reveal the political face of the economy, which have been obscured by liberal economists. Marx defined the secret behind the art of separation is that the disposition of power between the rich (individual capitalist) and the poor (worker) has its political configuration of the society as a whole.<sup>83</sup> A significant transformation has been occurring with the transition to the capitalist historic bloc. According to Marx, under the capitalist modes of production:

*"[t]he specific economic form, in which unpaid surplus-labour is pumped out of direct producers, determines the relationship of rulers and ruled . . . It is always the direct relationship of the owners of the conditions of production to the direct producers . . . which reveals the innermost secret, the hidden basis of the entire social structure, and with it the political form of the relation of sovereignty and dependence, in short, the corresponding specific form of the state."*<sup>84</sup>

What distinguishes the Marxist analysis so radically from classical political economy is that it creates no sharp discontinuities between economic and political spheres; it is able to trace the continuities because it treats the economy itself not as a network of disembodied forces but, like the political 'sphere', as a set of social relations.<sup>85</sup>

### 5.2.1 Marxist Theory and the Global Political Economy

The intention of Marxism is to provide a theoretical foundation for interpreting the world, changing it to a liveable, fair, emancipated place. In Marxist social theory, the social reality is conceived as a totality integrated and primarily constituted by modes of production. As a result of the social reality integrated as being the totality, it is crucial to analyse the historical evolution of the modes of production to discern key dynamics of social relations in different

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<sup>83</sup> *ibid.*

<sup>84</sup> Gill (n 75) 36, citing *Capital* vol. III (Friedrick Ebgels ed, International Publishers 1894).

<sup>85</sup> Wood (n 82).

historical epochs, which was explored previously in this thesis and employed the Gramscian understanding of the historical materialism as a method.<sup>86</sup> The mode of production must not be considered simply as being the production of the physical existence of the individual. Rather, it is a form of activity of these individuals and a form of expressing their life.

Marx developed a body of social theory with the core argument being the mode of production -an inherently social process- which is the key to understand the global political economy.<sup>87</sup>

The historical materialist approach and emancipatory practices are essential and constitutive for the modes of production by integrating with social reality. As Marx disclosed the capitalist historic epoch which is still in progress, the capitalist mode of production is nothing else than the historical process of divorcing producers from the means of production, a process of class struggles and interventions by the state on the behalf of the expropriating class.<sup>88</sup>

Marx shows social relations inscribed within the capitalist mode of production to give the ‘things’ sovereignty, especially money, over real social relations. The social relations appear to be dominated by impersonal ‘things’ where social relationship based on exploitation are systematically obscured through the mechanism of the capitalist production. Commodities are then fetishized by capital taking on a life of its own. He demonstrates that the product of labour is alienated from the direct producer (the worker) because, although it is the worker who produces wealth, it is the non-producer (the capitalist) who enjoys the fruit of that wealth. This creates a situation where “in imagination, individuals seem freer under the dominance of the bourgeoisie than before . . . in reality, of course, they are less free, because they are more subjected to the violence of things.”<sup>89</sup> In fact, the capitalist mode of production has to be

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<sup>86</sup> Gramscian approach manifests the social totality, analysing three analytical categories: material capabilities, ideas and institutions that interact to produce a historical bloc which constitutes authority structure at given time.

<sup>87</sup> Hazel Smith, ‘The Silence of the Academics: International Social Theory, Historical Materialism and Political Values’ (1996) 22(2) *Review of International Studies*

<<http://www.jstor.org/stable/pdf/20097442.pdf?acceptTC=true>> accessed 10 March 2016.

<sup>88</sup> Ibid, citing *Capital* Vol I (Friedrick Ebegels ed, International Publishers 1894).

<sup>89</sup> Ibid, citing Marx and Engels, *The critique of German Ideology*.



criticised in two categories. This process of exploitation is at one and the same time an economic and moral category. It is a theoretical concept derived from an analysis of the production of surplus value. It is also a concept which carries a value judgement as to the morality of the capitalist system, that it is wrong and unjust. Consequently, the Marxist theory is amalgamated into a recognizably non-positivist, empirically founded yet intrinsically value-laden explanation of human development.

However, Marx systematised his theory and ideology in the book, *Capital*, written between 1863-1883, which has been over a century and half ago. Hence, the Marxist theory should be updated and reinterpreted, and made compatible with the realities global political economy. This thesis rearticulates differently scopes of some of the fundamental Marxist principles, which will be highlighted in order to understand how this research will benefit by utilising it:

- As Gramsci approached the Marxist theory, this thesis adopts this approach preventing ‘immediatism’ that means the tendency to abolish mediating structures (market, parliament, law) and civil society in order to generate ever-increasing expectations of the collapse of capitalism. Nevertheless, these mediating structures remain historically potent elements so long as the theory does not close in upon themselves and approaches the changing world of today.
- A term ‘proletariat or working class’ often used in the Marxist theory does not only represent the working class but also symbolises all oppressed classes (counter hegemonic) against oppressing ones (hegemonic) in the global political economy such as peasants, shopkeepers and artisans. Therefore, the term ‘proletariat’ is given a wider meaning with respect to its scope by this thesis to indicate that the proletariat is not the only class suffering or to prevent one class dictatorship over other classes in the global political economy.
- The concept of ‘mode of production’ is here being used as formulated by Robert Cox:

*Production here is to be understood in the broadest sense. It is not confined to the production of physical goods used or consumed. It covers also the production and reproduction of knowledge and of the social relations, morals, and institutions that are prerequisites to the production of physical goods. . . . Production is both a social process and a power relationship.*<sup>90</sup>

The Gramscian approach to Marxism adopts an explicitly historical materialist approach, challenging the ontological, epistemology and institutional foundations of neorealism and neoliberalism that dominates the IR and the authority structure. The Gramscian approach seeks to explain changes in social relations of the global political economy. The Gramsci's approach to the Marxist theory is adopted by this thesis to analyse and establish the relationship and structure of global forces for the regulation of global issues in relations to the hegemony that is defined by Gramsci. Central principles of the Marxism are considered in the centre of hegemonic relationships of global social forces but some of the principles, as mentioned above, should be reinterpreted and rearticulated according to exigencies of the global political economy such as surplus value, class system and modes of production. The global political economy requires to open a new historic bloc as opposed to the capitalist historic bloc, as analysed in the previous chapter. In the new historic bloc, the material, ideological and institutional foundations play a key role to respond to the needs and the realities of the global political economy by regulating global issues. An outstanding question is how these foundations will be decided and shaped in relation to the authority structure. The configuration of a new historic bloc is based on the relationship of global social forces upon which authority structure ultimately rests. The Marxist approach is becoming prominent in the global political economy because it analyses hegemonic relationships between the global social forces in order

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<sup>90</sup> C A Cutler, 'Locating "Authority" in the Global Political Economy' (1999) 43(1) ISQ <  
<http://www.jstor.org/stable/pdfplus/2600965.pdf?acceptTC=true>> accessed 12 November 2014

for the regulation of global issues as global economic force is dominant among other global forces. Therefore, the Marxist approach is the key to examine and establish the global political economy in light of regulations of global issues with a democratic way that build up an authority structure.

As previously seen, practices of communist governments of abolishing private property and centralising all instruments of production in the hands of the State, is one of those unprecedented power over human life. For example: officials could decide what people ate, where they lived, how they worked and even what they wore. This thesis objects any kind of dictatorship including dictatorship of the proletariat, stressing that human freedom under any circumstances is a must. The Marxist principles indicated above in combination of democratic governance without any concession to the human freedom is the way shaping authority structure in the global political economy that requires to open a new historical epoch by shutting down the capitalist historic bloc.

### 5.2.2 The Marxist Theory, Global Forces and the LM

Globalisation creates a framework for the regulation of global issues on a range of economic and non-economic issues that have cross-border implications such as global trade, immigration, environmental and legal matters. Uneven economic forces of the global political economy are bound up with the development of global society which suggests a reconfiguration of the existing world order in the twenty-first century. The power in the capitalist historic bloc is so diffused throughout global society that the state ceases to have any specific and privileged role as a locus of power and authority. Hence, the internationalism appears to be an inadequate mechanism for the constructing power of global forces. The concept of the global citizen, whose class interests extend beyond the state, is left without influence over the way the global political economy develops.

The globalisation is establishing a single and planetary class interest as the same forces and the same institutions threaten the welfare of the people of all nations. The people must harness the forces of globalisation and overthrow institutions of internationalism by replacing them with their own. In doing so, the people will bring forward the era in which humankind ceases to be found by the irrational loyalties of nationhood. The problem is simply formulated: there is at global level no effective restraint of the ability of the rich and powerful to control the lives of the poor and weak. As mentioned above, the UN is a great example of this. This means that no constitutional measure which helps the weak (poor) will be adopted in the global political economy unless it also helps the strong (rich).

Global trade is the crucial and essential global issue, which has direct link to the global economic forces. It refers to the increasing integration of economies around the world, particularly through the movement of goods, services, capital, people (labour) and knowledge (technology). As seen, the historical evolution of the LM since the Medieval Age represents interests of merchant communities. Professor Goldman asserted that “*societas mercatorum*” a well organised and close-knit association of merchants exists on today’s world markets and acts as a legislator of the LM.<sup>91</sup> Therefore, the Marxist theory is key to the development of the global commercial law as the merchant community stresses the importance of the class system in the global political economy.

The complex structure of the domination of global political economy has its core at the extraction of surplus value. The structure of the authority depends on the power to appropriate the surplus value which sustains it. The extraction of the surplus by the global economic forces takes extra economic forms that economic exploitation may be achieved by political means. The rigid separation of the economic and politics ensures advantages to specific interest groups

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<sup>91</sup> Gunther Teubner , ‘Breaking Frames: Economic Globalisation and the Emergence of *lex mercatoria*’ (2002) 5(2) European Journal of Social Theory <<http://est.sagepub.com/content/5/2/199.full.pdf>> accessed 2 July 2016

that is called as the rich. Contradictions go hand in hand in a capitalist society. It is a power struggle between those who own labour power and those who sell it in order to create wealth. Conflicts arise between classes and are a result of questions of power caused by the contradictions. Fundamentally capitalist social relations were class power not individual power. This exposition stresses how intrinsic the surplus value in the global political economy that shows the constant battle to appropriate it by both producers and owners of capital. In addition, the relation of the exploitation is not limited to the economic oppression but also political, ideological and cultural oppressions.

The Marxist theory is generally a great innovation despite some failures especially in the context of the class system. Marxism reduces humanity's complex social and political relations to a simple conflict between the bourgeoisie and the proletariat. Any class which does not conform to this dialectic like peasants, artisans and shopkeepers is presumed to have been destined to decay and finally disappear in the face of industrial epoch.<sup>92</sup> They are presumed social scum with no legitimate existence in a post-revolutionary world. This problem is compounded by the Utopian myth at the heart of the Communist Manifesto: with the triumph of the proletariat, all conflict will come to an end through the free development of each and the free development of all.<sup>93</sup> However, according to dialectical materialism that has no ultimate synthesis, new struggles emerge through new forms of oppressions manifesting themselves as needs change and interests diverge. Then, a system that does not take account of this is a system doomed to paralysing corruption. Hence, any class should not be disappearing for the favour of any other classes. That the concept of the class mechanism serves individuals belonging to the same class or having the same interests gives an opportunity to regulate their own issues at global level, connecting the global forces. Although individuals within a class may be divided

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<sup>92</sup>George Monbiot, *The Age of Consent: A Manifesto for a New World Order* (Flamingo, 2003)

<sup>93</sup> Ibid.

against themselves, they are at the same time united around common interests derived from the inevitable conflict between social classes formed out of the division of labour.<sup>94</sup> In fact, the separate individuals form a class only in so far as they have to carry on a common battle against another class.

At this juncture, it is important to emphasise that the Gramscian concept of the hegemony also has an important place to arrange relationships of social classes. Gramsci's synthesis among social classes is the hegemonic relationship by making a difference between the classes as hegemonic and counter hegemonic rather than rendering one class' dictatorship over others. The global political economy cannot stand aside from the class conflict which is endemic in the capitalist historic bloc. The class consciousness that Marxist theory has so often emphasized must take a place against centrifugal global forces of the global political economy and its privatisation of political issues. The class based system can function as an emancipatory project that exposes real dynamics of the global political economy and at the same time assists classes which is destined to play the emancipatory role for the human species. In that respect, to locate and specify the authority structure at global level is highly critical.

### 5.2.3 The Class Based System of Emerging Global Order and Global Forces

Under the structure of the class based system in the global political economy, interrelationship of global forces underlies establishing dynamics and changes between social classes, which forms a new global order. As Marxist principles is assumed outdated in the analysis of today's existing system, one of the aims that has been adopted in this thesis is to update the principles of Marxism with the realities of the global political economy because key principles of Marxism are still relevant to the global political economy. While dominant theories (realism and liberalism) put the state at the core of their doctrine, Marxism offers an alternative way to explain and ultimately to change the world order, which suits to regulate global issues. In order

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<sup>94</sup> Smith (n 87).

to find solutions for problems of the global political economy, the interrelationship of the global forces is essential. As the existing world order is analysed from the bottom upwards in Chapter 4 as well as the top downwards in this chapter, a dialectical appraisal of the global forces is a concern with movement rather than management.<sup>95</sup>

The Marxism rearticulates a new elixir bringing out necessities of the emerging global order in order to meet with requirements of the global political economy. This thesis has utilised two methods (the bottom upwards and the top downwards) to examine the essentiality of a global order. These methods demonstrate a global social formation constituted by the degree of integration/disintegration of social structures and forces. This is the fundamental basis for understanding the global political economy that the emerging global order is founded upon a historically specific yet changing ensemble of social forces.<sup>96</sup> Therefore, the new emerging global order is attributed to a range of globalising forces which are integrating the material, political, social and cultural life of so many individuals on the planet, but which are simultaneously disintegrating previously embedded forms of socio-economic and political organisation.

In this context, a prominent question is how the interrelationship of the global forces is managed especially with regard to the global authority structure in order to respond to the needs of the global political economy by regulating global issues. The emerging global order needs to be conceived as a totality, and the social forces which operate within that system are not territorially bounded or determined. The synthesis between the global forces creates a historic bloc, which may at times have the potential to become hegemonic. In relation to the conclusion of chapter 4, the global political economy requires to open a new historic bloc by closing up the capitalist historic bloc.

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<sup>95</sup>Stephen Gill, *Gramsci, historical materialism and international relations* (Cambridge University Press 1993).

<sup>96</sup> Ibid.

The emerging global order should be maintained by integrity and specificity of the global forces without emptying their social content and forming artificial discontinuities between them. The crucial point to determine here is what the global forces are and how the mechanism of the interrelationship between the global forces functions. In order to determine them, the term “global issues” which has already used in various section of this reseach has a vital role to find answers to these questions by establishing the emerging world order in the global political economy. The Global Risk Report, 2016 (see Appendix 4) is the substantial indicator to identify what the global issues are, bearing in mind that global issues are not limited with this report and might alter through time as global society evolves. According to the 2016 Global Risk Report, the global issues are classified under the five categories which are potential global forces: economic, environmental, geopolitical, societal and technological issues. In terms of the likelihood, the top ten global issues are:<sup>97</sup>

- Large-scale of involuntary migration
- Extreme weather events
- Failure of climate-change mitigation and adaptation
- Interstate conflict
- Natural catastrophes
- Failure of national governance
- Unemployment and underemployment
- Data fraud of theft
- Water crisis
- Illicit trade.

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<sup>97</sup> World Economic Forum, ‘The Global Risks Report 2016’ (2016) < [http://www3.weforum.org/docs/GRR/WEF\\_GRR16.pdf](http://www3.weforum.org/docs/GRR/WEF_GRR16.pdf) > accessed 30 September 2016.



It should not be overlooked that all the global issues have been interconnected in different ways as Appendix 5 indicates where the emerging global order is required to regulate global issues. As for what mechanism ensures/should ensure to construct the interrelationship of the global forces, the interrelationship of the global forces is vital to analyse as it composes social reality. Marxism adopts modes of analysis which is a “base-superstructure” approach to interconnect the global forces like the global issues shown in Appendix 5. The Marxist principle the “base-superstructure” treats the global economic force as base and the rest of the global forces as superstructures such as legal, environmental, societal forces, in which the global economic force is the determinant factor by now.<sup>98</sup> In other words, the global trade, a global issue, is a social relation of the production that global economic forces express certain determinate social relations. This attempts to maintain the integrity of the production and to work out the implications of the fact that the economic base exists in the shape of specific social processes and relations. This explains why the global economic force is prominent in the global political economy by summing up reasons for the emerging global order.

However, the global economic force is made up of its specific social determinations: specific social relations, the hegemony, legal and political forms. This does not simply mean that the economic base is reflected in and maintained by certain superstructure forces but the modes of the production base itself exists in the shape of social, juridical and political forms.<sup>99</sup> The global forces are therefore organic constituents of the social reality, thereby that ‘base’ and ‘superstructure’ or the levels of a social formation cannot be viewed as compartments or regionally separated spheres. Marxism does not present the relation between base and superstructure as an opposition but rather as a continuous structure of social relations and forms. Thus, connections between ‘base’ and ‘superstructure’ can be traced without great

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<sup>98</sup> Ellen M Wood, ‘The Separation of the Economic and the Political in Capitalism’ (1981) 127 New Left Review I < <https://newleftreview.org/i/127/ellen-meiksins-wood-the-separation-of-the-economic-and-the-political-in-capitalism> > accessed 22 July 2016.

<sup>99</sup> Ibid.

conceptual leaps because they do not represent two essentially different and discontinuous orders of the social reality.<sup>100</sup>

There is also another dimension with regard to the interrelationship of global forces. As implied above, the interrelationship of the global forces has dynamic and mutant characters. Accordingly, the global economic force does not function always as the base within the interrelationship of the global forces. There is no necessary harmony among the forces of the global political economy as in Marxist concept between 'base' and 'superstructure'. The emerging historic bloc is a dialectical concept in the sense that the interacting global forces create a larger unity. Gramsci expressed the interacting global forces as structure and superstructure by avoiding any reductionism either to the economic force or another forces.

The dialectical appraisal of the global forces is a concern with movement rather than management. To illustrate differences in the interrelationship of the global forces, a military analogy of "War of Movement" and "War of Position" is applied to do so as Gramsci used. The analogy the war of position and the war of movement is useful for considering the interrelationship of the global forces in the global political economy. The war of position is the slow, hidden conflict where global forces seek to gain decisive influence and power in the global society that can ignite counter hegemonic formation.<sup>101</sup> On the other hand, the war of movement is the phase of open conflict between the social classes where the outcome is decided by direct struggles between the classes. While the war of position is simply taking a position of the influence in the global society, the war of movement is the exertion of the hegemony when this influence is mobilised overtly and coherently for the social reality.

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<sup>100</sup> Ibid.

<sup>101</sup> Dara McHugh, 'War of Position/War of Manoeuvre' (2013) <<https://spiritofcontradiction.eu/dara/2013/02/13/war-of-positionwar-of-manoeuvre>> accessed 25 October 2016.

The global political economy is at this stage where the global forces fighting over for the “war of position” and then the next stage will be the “war of movement” that relates to the global authority structure between the social classes. To know where the global political economy needs to build the authority structure, the first step in thinking about fighting a war of position is to identify what the important positions are. Global society needs to know where the global forces should be concentrating to gain influence in connection with the global issues, considering direct involvement with the class based system of the global authority structure. However, the war of position is only a starting orientation: the global society won’t be able to progress until society moves beyond that and develops the understanding of the global political economy, mapping out to build the class power. The 2016 Global Risk Report gives clues about the fighting over the war of position between the global economic force and global environmental force. Despite that the global economic force have still occupied the ‘base’ in the global political economy, the global environmental forces or the global societal forces could replace the economic force when considering the top 10 global risks as global issues in terms of the impact according to Appendix 3. The global issues carrying potential risk for the global political economy ignite the war of position between the global forces such as water crisis, failure of climate-change mitigation and adaptation, and weapons of mass destruction.<sup>102</sup>

As a result, identifying the distinctive characteristic of the historical evolution of the LM has led to the capitalist historic bloc with its unprecedented degree of differentiation between economics and politics. The historical path of the social forces should be seen as an increasing and uniquely well-developed differentiation of the class power as something distinct from the state power. Significant structural changes in the existing world order is likely to be traceable to some fundamental changes in social relations. Only the war of position brings about

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<sup>102</sup> World Economic Forum (n 97).

structural changes in the long run and involves building up the socio-political base for change through the creation of new historic blocs. The new historic bloc that the global political economy initiates cannot stand aside from the class conflict which is endemic in the capitalist historic bloc. The class consciousness that Marxist theory has so often emphasized must take place against centrifugal global forces of global political economy. The class based system can function as an emancipatory project that exposes real dynamics of global political economy and at the same time assist classes which are destined to play the emancipatory role for the human species. The global economic force, as analysed above in the global trade, is the crucial force to forge the new historical era of the global political economy but not the only one. Accordingly, the interrelationship of the global forces is dispensable for the global society and authority structure. The crucial challenge lies in locating and identifying authority globally, projecting how the war of movement must be handled in the global political economy. In that respect, to locate and specify the authority structure at global level is highly critical.

## **Chapter 6**

Having analysed the role of the LM in the global economy proves that the nature of authority has changed within generations and with the enforcement of global commercial norms. As the existing world order is examined from the bottom upwards in chapter 4 as well as from the top downwards in chapter 5, the global commercial law is fundamental to the global political economy that the LM may be regarded as both a constitutive element of global legal paradigm and an attribute of global order. The significance of the LM is integral to the restructuring of the global political economy taking place through deeper transformations in local and global political and economic relations by forming juridical formations. Considering that democracy is still the best method for regulating global issues, the global law paradigm is prominent in the context of the interrelationship of global forces because existing theories of the international law have not corresponded the needs and the realities of the global political economy. To anticipate the future status of the LM especially in relation to global authority relation is essential for restructuring the global political economy. Therefore, locating and specifying the structure and the nature of authority in the global political economy is bound to the LM.

### **1 The Interplay between Economic Forces of Global Society and Global Authority Structure**

Being compatible with the previous chapter of interrelationship of forces of the global political economy, global economic force plays a prominent role in relation to the global authority structure. Accordingly, the global economic force has been forming social reality as a base, adhering to “War of Movement” and “War of Position” within the interrelationship of global forces being contrary to domestic forces. Hence, the LM could not be separated from these

discussions in the global political economy as the authority structure has been changing with generations and enforcement of global commercial norms.

The phenomenon of globalisation should also be highlighted in regard that globalisation influences the pattern of governing arrangement, displaying the emergence of new institutional configurations. Given the growth of global and regional bodies equipped with a broad range of regulatory powers, this indicates alterations on the state-society relationship. The material, ideological and institutional hegemony exercised in the capitalist historic bloc raise crucial problems for locating and identifying authority globally. The challenge lies in rendering authority in the global political economy where political authority ostensibly stops at the territorial borders of the state, while economic relations do not. The juridification, pluralisation and privatisation of commercial norms are crucial to recognise that the state-society relations are being reconfigured by the distinction of private and public realm. The distinction between the private and public realm includes and reflects on other distinctions between economics/politics and local/global. It is important to note that the public/private distinction is a historically specific analytical construct that has undergone revision with changing material, ideological, and institutional conditions. Privatised legal norms are increasingly finding their way into both international and national commercial systems by structuring domestic and global economic relations in ways that have a significant impact on the global political economy. The distinction of the private and public sphere affects globally the authority structure and causes a problematic nature of authority in the global political economy: the former is associated with civil society and economy while the latter is belonged to the state and government. Having experience changes and shifts in the relationship and balance between activities of the public and private spheres, the changing nature of public and private authority renders the social unity problematic in the global political economy.

All economic activities require a system of governance that provides a set of rules and procedures to govern economic transactions. This creates a demand for authority. Global trade is a large and growing realm in which the framework of governance for global economic transactions is increasingly created and maintained by the private authority, not by the state or interstate organisations.<sup>1</sup> But why private authority? Art of separation, namely the rise of (neo)liberal ideology, has a substantial role to explain why, emphasising the economic sphere makes room for private governance, which public authority may not exist in issue domains of economic activities. This creates a void that private authority can fill due to increased technological complexity, lack of the requisite expertise or increased costliness of maintaining that expertise. In addition to that, states are consciously complicit in the creation and increase of private authority in the global political economy because the privatisation of commercial norms allows a de-politicising shift in responsibilities from the public authority.

In economic issue domains, the private authority is provided predominantly through various forms of cooperation among firms that develop standards and have an incentive to provide governance. This privatisation of authority matters for global governance because it has taken place simultaneously with the increasing shift of standardisation from domestic to the global level. A critical question to be asked for the rise of the private authority is “Do issue domains matter?” Yes, issue domains certainly matter to comprehend the separation of private and public authority. Without making any differentiation between local and global issues regulating both issues under the same order, it crystallises a reverse trend from public to private authority as global issues necessitate global and exclusive regulations, no longer bounding up with territorial solutions of states.

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<sup>1</sup>Tim Buthe, ‘Governance through Private Authority: Non-State Actors in World Politics’ (2004) 58(1) *Journal of International Affairs* < [http://people.duke.edu/~buthe/downloads/Buthe\\_JIA\\_corrected.pdf](http://people.duke.edu/~buthe/downloads/Buthe_JIA_corrected.pdf) > accessed 9 August 2016.

Furthermore, the question of accountability arises with global governance through private authority. Private authority is not accountable as public authority is and is inherently problematic and defective. The significance of the private authority is obscure and little is understood by dominant approaches of international relations and law although the significance of private corporate power and its hegemonic authority relations are blindingly obvious in the global political economy. This thesis' primary purpose is to examine the importance of the status of global corporations in direct relevance to the analysis of global authority. When combined with state-centric analysis, the public/private distinction renders the political significance of global corporations invisible. The political significance of global corporations, which are major agents of private power and key players in the creation of the LM, is filtered through the lenses of state power or corporations. In other words, corporations are denied status as full subjects of the law under dominant international approaches.

Despite the emergence of the global authority structure, the focus of authority is still largely territorially bounded in formally sovereign states. International hegemony has been associated with the dominance and leadership of a powerful state within the system of international relations, rendering power over other states. However, this is an unsatisfactory definition since the hegemony associates global social forces. In fact, the global system needs to be conceived as a totality, and the social forces which operate within that system are not territorially bounded or determined. Thus, internationalism alone appears to be an inadequate mechanism.

What is needed is a development of new approaches discerning the realities and dynamics of the global political economy through the elaboration of historically integrated, dialectical forms of explanation that appropriates to the conditions of the twenty-first century. In this context, this thesis opens a window, and by no means the only way, to elucidate alterations and transformation taking place in the global political economy. Of course, there is no single or



straightforward way to define or elaborate the war among global social forces. This partly reflects the crisis of the existing world order which demonstrates changes in the intellectual world and challenges to hegemonic discourses in the study of the IR and international law. Historical dialectic among the global social forces especially between economics and politics is changing in the global political economy, producing new material, institutional and intellectual conditions. These changes are central to our understanding of the emerging world order so as to engage with the interrelationship of global forces into more integral counter-hegemonic discourses from local to global.

The democratic and progressive concept of participatory democracy is an embryo of the counter hegemonic approaches. So as to ensure global measures redistributing power and wealth equally and fairly, society must free itself from the imposed order of coercive institutions that constrain life's creative power. To be truly free society must learn to practice a mindful self-restraint in the use of freedom.<sup>2</sup> Everything has been globalised except our consent in the global political economy as democracy alone has been confined to the state. The regulation of global issues has a crucial place to determine on the features of the emerging global order. Otherwise, the concept of global citizen<sup>3</sup>, whose class interests extend beyond the state, is left without influence over the way the global political economy develops. Therefore, the regulation of global issues brings out the globalisation of society's consent under the circumstances drawn by this thesis.

In the global political economy, mere democratic world order is not enough despite that democracy is more consensual than any other political system. Recent examples of BREXIT and the USA Presidential Election of 2016 should be analysed attentively why society's dissatisfaction arose against their democratic result in the global political economy. This also

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<sup>2</sup> George Monbiot, *The Age of Consent: A Manifesto for a New World Order* (Flamingo, 2003)

<sup>3</sup> Which is described at previous chapter.

highlights the importance of the emerging global order. Democracy is still the best method to govern the global political economy under the Marxist class system<sup>4</sup>, rendering each class to have their own voice of its rights and obligations. For this reason, a global class based system of Democracy has a vital substance for people having the same or similar concerns and interests. Thus, the legal structure of the global political economy is vital in relation with the global authority structure: this explains why the LM has an important role in the global political economy.

## **2 Positive Law, The Global Commercial Law and Rational Dominance**

Global trade is the prominent global issue in connection with the LM and global economic forces. Global trade is impossible except within a framework of law as the more complex the economic ties which unite us, the more comprehensive must be the law which governs this economic relationship. Global economic forces that span national boundaries must engender a body of law which is global. People in the global political economy are becoming ever more dependent on one another for the common needs of daily life. The logic of this movement towards one world is one law in those areas wherein uniformity is necessary and convenient. The global commercial law is the idea of the self-defence of the global society against the disintegrating and atomising thrust of global economic forces.

The global commercial law would not only be problematic to the concept of state sovereignty but would also seek to articulate and develop conceptions of global citizenship and the accountability consistent with democratic control over global economic forces. These efforts must show respect for differences, avoiding ethnocentric approaches and assist the development of global counter-hegemonic historic blocs. In order to thrive approaches for the global counter-hegemonic historic blocs, thought process must be de-familiarised with the

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<sup>4</sup> This thesis' understanding of the Marxist class system is defined in the previous chapter.

existing world system, being challenged with changes and dynamics of the global political economy. These examples are simple ways of doing it: what-how we now generally take for granted has not always been present and this did not grow naturally in a predetermined way; what impact dominant discourses are having and how that in turn is being challenged; how a dissimilar way of thinking, when closely scrutinised, produces a different way of thinking that destabilising the received way

The state's loss of their formerly dominant position in global policy and rule-making with going along the decreased significance of its sovereignty and the freedom of parties in global contract law have caused a reconsideration of the traditional theory of legal sources. The traditional theory of legal sources is the force of the sovereignty state, meaning that only those rules adopt the quality of legal norms that have been vested by the sovereign state, the only source of the law. Since the law has to take account of complexities of the global society, a non-positivistic approach of the law has begun to emerge. This tension between the state-based existing system and global trade explains the tension within the law. Commercial norms are the outstanding part of the law, which leaves behind its state-based structure and adopts instead a structure of the global political economy. For example: The International Chamber of Commerce (ICC) has a significant role in forging globally agreed rules and standards that companies adopt voluntarily and can be incorporated in binding contracts.

Like in Medieval Time, the global society realises that piecemeal regulation of global commerce through the application of independent national laws impedes the growth of global trade. Once released from the application of national law, the global business community has been creating a coherent body of non-national law. This is the global commercial law namely the LM. The global commercial law has a number of advantages over a national law. First, the global commercial law can more easily provide the needed uniformity to the regulation of

global transactions as well as the transaction costs involved in the application of a domestic law to global transactions that hamper the development of global trade. Secondly, freedom of contract and party autonomy are essential to the development of the global commercial law. In exercising this power, parties are free to determine and define fundamental elements of their contractual relationship: applicable law, adjudicatory bodies and sanctions for non-compliance with law. On the other side, the global commercial law plays a crucial role that overcomes self-validation of contract leading directly into the paradox of self-reference. In other words, this means “contract without law”. Thirdly, these changes have prompted a series of legal developments relevant for the global commercial law. One of the most important developments is arbitration as an adjudicatory body of global trade, which is accepted by international system by signing up the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It leads to the growing importance of global rules in contractual relationships within the arbitration. Parties negotiating global contracts would often feel the need to submit their agreement to neutral rules which do not favour either of parties. A traditional compromise solution consists in submitting the contract to the law of a third country - for instance Swiss law, English law or Swedish law. However, as mentioned in detail in chapter 3, how justly national laws responds to the needs and the realities of the global political economy within arbitration, which a national commercial law is not formulated needs and requirements of other party’s homeland. Thus, the global commercial law plays a crucial role that creates an alternative neutral framework within arbitration in the global political economy. This approach then entails the existence of an autonomous legal system that can govern global contracts instead of domestic laws, and develop tailor-made solutions within such frameworks. Moreover, it also functions to provide a unity of purpose and coherence in regulation that is obscured by notions of pluralistic or fragmented governance.

As a result, this research reveals the important roles of the LM in light of current legal, political and economic realities as one of the most outstanding global legal branches and issues. In order to form a fair and equitable global legal order, the LM is certainly going to be a model norm to other global legal branches such as environmental law and sport law. For this reason, the essential nature of global commercial order is crucial in the global political economy.

### **3 Requirements of Global Legal Order**

A global legal order is requisite to regulate global issues in the global political economy. The central argument for the requirement of a global legal order is the differences in origin between global issues and local issues, which should be differentiated from each other in order to be regulated. To govern global and local issues under the same legal order is inadequate and unfair because global issues have a different value system and are surrounded by particular circumstances that differs from local issues. The LM that regulates global trade issues is the most successful example of the concept of global law. The denationalisation of the legal process of global issues has been observed within arbitration especially within the global trade. The denationalisation of the global issues draws all attention to the relationship between global rule-making and global legal theory, which is crucial for the future direction of the LM. Taking into consideration a global authority structure in this context, the global legal order should be discussed as a prospect of the LM which is crucial to have the global legal order as an example for other global issues.

Existing dominant theories of International law and international relations do not overcome the shortcomings of an exclusively statist perspective and do not move towards substantive solutions for the global political economy. The dominant theories have limited validity as well as a lack of plausibility in explaining complex social transformations and constituents of the emerging world order because the global political economy are in large part explicable by the

hegemony of social forces and the formation of counter-hegemony.<sup>5</sup> Conventional approaches of the international relations include realism and liberalism while in international law, legal positivism attributes the binding force of international law to states and states consent. Furthermore, the dominant theories, being notoriously positivist, have been infamously conservative in application. For this reason, Marxist discourses have been virtually non-existent on the discipline and almost entirely absent from mainstream discourses although it has seen a minor renaissance in the dominant theories drawn from variants of Marxist thought. Accordingly, what is needed is the development of new approaches to the global political economy through the elaboration of historically integrated, dialectical forms of explanation, appropriate to the conditions of the twenty-first century.

The notion of non-state actors remains problematic in the global political economy. It comprises any actor that is not a state, including non-governmental organisations, multinational corporations, general public, international professional organisations etc. a question is that “Can any single analytical framework accommodate and explain the genesis, activities and impact of such a diverse set of actors within the existing world order?” The point of mentioning the non-state actors demonstrates that subject of the law has to be defined again with being pursuant to the global political economy as international law is simply irrelevant to non-state actors’ activities. Avoiding drifting away from the main discussions of this thesis, it is the inability of the dominant approaches to theorise status of global corporations as “subjects” of the law. Under international law, global corporations have been traditionally regarded as analogous to individuals as ‘objects’ and not as ‘subjects’ of the law. In the global political economy, paradoxical exercises of public authority by non-state actors which are putative “objects” of the law remain invisible as legal “subjects”. In the importance of defining “subjects

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<sup>5</sup>Stephen Gill, *Gramsci, historical materialism and international relations* (Cambridge University Press 1993).

of the law” of the global political economy, the dominant theories of international law and relations do not provide assurance of meaningful democratic participation for individuals nor of the defence of their rights against non-state actors regarding to regulation of the global issues.

The mechanism of investment arbitration is a good example of indicating the significance of global corporations as full ‘subjects’ of the law. The investment arbitration has a unique and ironic feature indicating that the investment arbitration engages disputes arising from the public capacity of national states as opposed to the private capacity of those, which national states waive its adjudicatory sovereignty in favour of arbitration as a global dispute resolution mechanism. Considering that the regime of the international investment has been rapidly developing since the 1990s as a global mechanism of adjudicative review, four key features of the investment arbitrations are:<sup>6</sup>

- They permit investor claims against the state without exhausting local remedies
- They allow claims for damages
- They allow investors to directly seek enforcement of awards before domestic courts
- They facilitate forum shopping.<sup>7</sup>

The effect of the combination of the unique features in investment arbitration is to subject the regulatory conduct of states to control through compulsory global adjudication to an unusual extent as opposed to the existing system. It is precisely globally generated adjudicative norms and mechanisms to exert a strong disciplinary influence over domestic systems that the investment arbitration functions to constitute a global administrative law.

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<sup>6</sup> Gus V Harten and M Loughlin , ‘Investment Treaty Arbitration as a Species of Global Administrative Law’ (2006) 17(1) EJIL < <http://www.ejil.org/pdfs/17/1/65.pdf> > accessed 28 January 2016

<sup>7</sup> The investment arbitration facilitates forum-shopping by investors through the selective establishment of holding companies for expanding the reach of the investment arbitration.

In light of all the assessments made in this chapter, it takes us to the analysis of the distinction between the public and private sphere. The dominant theories of the international law and relations are premised upon the liberal “art of separation” wherein markets and civil society are regarded as separate and distinct from politics, governments and the state. The distinction between private and public international law is not reflective of an organic, natural or inevitable separation, but is an analytical construct that evolved with the emergence of the state.<sup>8</sup> It is important to understand how private international law operates in the global political economy in order to capture its role as an interface of local and global legal order. Privatised legal disciplines are increasingly finding their way into both global and domestic legal orders, which have a significant impact on state-society relations. Private international law ranges from rules regulating family relations to those regulating global commercial transactions. However, its designation as private international law is increasingly inaccurate and extends well beyond borders of the private sphere. Thus, the private international law operates more like a public international law and less like conflicts of laws.

Significantly, as part of this transformation, the LM was privatised and neutralised of political content as it became a component of the private international trade law. Accordingly, the main reason for the disjuncture between commercial practices and commercial law, as analysed in chapter 2, is public and private distinction in international law. The focus in law-making is shifting to private regimes for not just the economy but also other social sectors such as medicine, education, transport and technology. On their path to globalisation, their developing and massive requirement for norms is not met by governmental and intergovernmental institutions but by themselves in direct action upon the law. Increasingly, global private

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<sup>8</sup> Claire A Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press 2003)



regimes are producing substantive law without the State, without national legislations or international treaties.<sup>9</sup> The rapid spread of private regulation, agreements and dispute resolution is growing such as arbitration that are developing into courts of private sphere acting as an organised subsystems of world law, but getting along without prior governmental infrastructural provision.<sup>10</sup> The complexity of the LM in which the contested nature of the relationship between public and private trade law operate and the location of the LM within this legal framework contribute to a lack of understanding of its significance. Therefore, the dissolution of the distinction between private and public sphere consolidates the role of the LM as part of the global legal order in the global political economy.

Otherwise, the distinction between private and public international law and lack of the global legal order engender to a system called *contract sans loi* “contract without law”. The phenomenon of contract sans loi, also known as the auto poiesis system, is a self-reproducing, worldwide legal discourse which narrows the boundaries to the use of a legal/illegal binary code and reproduces itself by processing a symbol of global validity.<sup>11</sup> The vicious circle of contractual self-validation is transformed into the virtuous circle of contractual arbitration, externalising this process through arbitration at the expense of lawlessness of the arbitration. Apparently, this is dead end. Any self-validation of contract leads directly into the paradox of self-reference, which directs to endless oscillation (valid – not valid – valid – not valid ...) and blockage.

This example sums up the importance and exigency of the global legal order and considers that a teenager exchanging goods online such as Xbox software. To what extent and how the

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<sup>9</sup> Gunther Teubner, ‘Global private regimes: Neo-spontaneous law and dual constitution of autonomous sectors in world society?’ (2004) < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=894423](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=894423) > accessed 1 November 2016.

<sup>10</sup> Ibid.

<sup>11</sup> Gunther Teubner, ‘Global Bukowina: Legal Pluralism in the World Society’ (1996) Dartmouth < [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=896478](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=896478) > accessed 8 August 2015

teenager buys and sells Xbox games on the basis of mutual trust, by trustworthy and reliable means? To what extent does the teenager trust online sites imposing their own restraints? How and by whom would weak parties' interests be advocated in the global political economy in terms of global issues? In this dynamic, the most dramatic changes are taking place at the edge of the law. In globalisation dominant law-making is shifting from centres of the law which had been politically institutionalised in the nation state to the boundaries between the law and globalised social sectors. But the law governing social relations in different social sectors is not present at a global level.

This manifests crisis of the existing world order. World orders are grounded in social relations. A significant structural change in the existing world order is likely to be traceable to some fundamental changes in social relations as analysed in chapter 4 and 5 from the bottom upwards and the top downwards respectively. This would come about with the emergence of a new historic bloc. In the new historic bloc, the emerging world order is founded not only upon inter-state relationships but also upon a globally-conceived society. The emerging world order in the global political economy is based upon the interrelationship of the global forces, which global economic forces have formed its superiority for now as a base over other global forces. Therefore, mode of production of global extent bring about links among social classes of the global political economy.

Within this framework of the discussion, changing world order begins with the long, laborious effort to build the new historic bloc within national boundaries. On the other side, the regulation of global issues entails a new global order that is crucial and indispensable for the global society. In exposing the inability of existing theories to account for the nature and scope of the global political economy, it is requisite to establish the role of the LM as the global business law in developing a new theory of global law paradigm, regarding construction of global authority structure. The concern that the concept of the territorial state-society is ideologically

motivated and deeply flawed, analytically and historically, has contributed to efforts to reformulate our understanding of global authority. Therefore, locating and specifying the structure and the nature of authority has changed with the emergence of a different historic bloc and is bound to the future status of the LM.

#### **4 Global Law Paradigm and Global Authority Structure**

The global law paradigm and the global authority structure are outstanding and inseparable concepts of the global political economy in the new historic bloc. Discussions of the global law paradigm cannot be separated from those of the global authority structure because the concept of the global law paradigm requires the existence of global authority structure. Particularly, as analysed in chapter 4 and 5, the roles and significance of the global commercial law in the global political economy proves that the nature and structure authority has been changed within generations and with the enforcement of global commercial norms. To anticipate the future status of the global commercial law, the LM, in relation with the global law paradigm and global authority structure is determinant and crucial for restructuring the global political economy. Therefore, establishing the role of the global commercial law in the construction of the global law paradigm is essential and fundamental, regarding the global authority structure so as to provide a common language and fair business culture and to correspond to the needs of the realities of the global political economy.

To understand better the connection between processes of legal evolution and social differentiation, it is necessary to give up an idea that a legal system in its strict sense exists only at the level of the nation state. A tension between the state-based existing system and the emerging world order reveals the shift within the law. This shift of the law from a state-based structure deals boundaries of the law from between nation states to between different sectors of the global political economy. The traditionally differentiation in line with the political

principle of territoriality into relatively autonomous national legal orders is thus overlain by a sectoral differentiation principle: the differentiation of global law into global legal system, which define the external reach of their jurisdiction along issue-specific rather than territorial lines, and which claim a global validity for themselves.<sup>12</sup>

All theories are for someone and some purposes, and have at least a perspective. Perspectives derive from apposition in time and space, specifically social and political time and space. There is accordingly no such thing as theory divorced from a standpoint in time and space, which stressed an empirical support for creating an alternative world. An empirical support should proceed in conjunction with normative analysis with the two infusing each other. This is especially true when examining the global commercial law since it has developed out of exigencies of the global political economy such as UNIDROIT Principles and United Nations Convention On Contracts for the International Sale of Goods (CISG). New normative structures represent a corresponding tendency to respond to this fusion of economic rationality with legal relations. This explains why unification of global legislation and the global commercial law are needed to fill gaps. However, on the other hand there is a substantial gap between theory and practice of the global commercial law. It seems that the dissemination of information about the global commercial law is not able to keep pace with globalisation of legal practice and globalisation of legal processes. According to the Central Inquiry that is the most reliable world-wide study, it shows why 275 (43.04%) of the addressees replied that they were not sure whether to use global commercial law in the future while only 125 (19.56%) refused to use a concept of global commercial law in the future.<sup>13</sup> Taking into account the 165 addressees (25.82%) who were sure to use global commercial law in the future, 440 (68.86%)

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<sup>12</sup> G Teubner and A Lescano-Fischer , 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25(4) Michigan Journal of International Law < <file:///M:/documents/Downloads/SSRN-id873908.pdf> > accessed 2 November 2016.

<sup>13</sup> C R Drahozal and R W Naimark, *Towards a Science of International Arbitration* (Kluwer Law International 2005)

out of the 639 useful responses reveal a positive and neutral attitude towards global commercial law.<sup>14</sup> This is very important evidence displaying the existence of the concept of the global commercial law as well as the gap between theory and practice of the concept of the global commercial law. Thus, the global law paradigm plays an important role to erase the gap between the theory and practice of the global commercial law.

#### **4.1 The Global Law Paradigm**

Global law would experience a radical fragmentation not along territorial but along issue-specific or social sectoral lines. This transformation has been affected by globalisation during the transition from nationally organised societies to a global society. Autonomous fragments of the global society such as globalised trade, science, technology, education, medicine, transportation and mass-media have been developing an enormous demand for regulation legal norms which cannot be satisfied by national and international institutions. Instead, such autonomous societal fragments satisfy their own demands through a direct recourse to law. Globalisation is relevant for law, consisting of changes to the dominant law-making processes as the global economic forces undermine state-centred law making processes and then change the existing legal systems with dynamics of the global society. In globalisation, law appears to be entangled in economic and political settings, which move into a new dimension of de-politicisation and de-centralisation and de-individualisation.<sup>15</sup>

Within this context, the role of the LM was drawn into a paradox of the existing legal systems which consists of a brief excursion into the analytical nature of ‘subjects’ and ‘sources’ of international business law, the nature and operation of the private international trade law and the separation of the private/public distinction in international law. On the other hand, legal pluralism is no longer only an issue for legal sociology, but becomes a challenge for legal

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<sup>14</sup> *ibid.*

<sup>15</sup> Teubner (n 9).

practice. Conventionally, rule-making by the private sphere has been subjugated under the hierarchical frame of the national constitution. With the global law paradigm that renders a picture of the fundamental transformation of global law from territorial to a sectoral differentiation, the new frame of legal institutions can only be hierarchical as a sequence of recursive legal operations. The global commercial law is allowed to break the traditional frames of international private law in the light of the interrelationship of global forces.

The Global law paradigm stresses the issue-specific yardstick rather than the territorial one, which claims global validity for global issues. In polycentric globalisation there would be potentials and a tendency for re-politicisation, re-regionalisation and re-individualisation of norm-making processes at the remarkably multiplicity of the global society. Due to hard-core social reality: fragmented societal sectors, the difference between highly globalised economy and weakly globalised politics pressed for the emergence of a global law that there is no legal order organising relationship of global norms, which could keep the contractual paradox latent.<sup>16</sup> According to legal sociology, history breaks old regimes provoking us to build new ones with social reality changing: almost a rhythmical movement of de-framing, re-framing, de-framing . . . Globalisation breaks public-private international law paradox to establish the global law paradigm. The LM is the important global law that the global law paradigm restructures but not the only one. Various sectors of global society are developing a global law of their own, having relative insulation from the state-centric mechanism. These global issues developing their own law are such as labour law, human rights law, sport law and environmental law. What makes the LM prominent among global issues is that global economic forces take the 'base' of social reality as analysed in chapter 5.

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<sup>16</sup> *ibid.*

Although global laws establish themselves globally as a unitary social system in line with the logic of functional differentiation, laws of global society become entangled within sectoral interdependences. Unity of the legal system would be achieved through the global legal paradigm but it must also reckon with a multitude of internal contradictions between issue-specific sectoral laws. The main reason for collisions of global laws is each of whose current development logic carves out its autonomous global law. For example, the LM may collide with the World Health Organisation's norms that derive from fundamental principles of the health system. Or, construction law may collide with global environmental law. The reason is that global society is a society without an apex and a centre, which means there is no authority in a position to undertake the coordination of societal fragments. The immediate consequence of it is that high expectations of the law to deal adequately with legal fragmentation must be curbed since its origins lie not in law, but within its social context. This reveals the importance of social reality that ought to be maintained and developed by the global authority structure. In order to avoid the contractual paradox and collisions of global laws, the global authority structure is essential in the global political economy especially in relation to the LM. With the global authority structure and the global law paradigm, arbitration instances must move beyond concrete contractual terms, taking into account of social reality i.e. environmental consequences and human rights complications.

This would be a good example to explain the essential nature of the global authority structure in connection with the global law paradigm: If the object of a global law is to guarantee respect and if the principles of an arbitral tribunal considers as forming a part of global policies which the global authority constitutes, it must find that the global law would prevail over the will of parties. Because of the global character of these norms, a connection between the state that enacted the mandatory rules and the dispute is not necessary.

Furthermore, the global law paradigm should redefine the legal 'subject' of the global society, which is crucial to form the structure of the global authority that is based upon the class-designed system, being compatible with chapter 5. As examined at related parts of this thesis, national states are the only official legal subject in international law. In the existing system, non-state actors are putative 'objects' of law but remain invisible legal 'subjects'. Leaving aside cultural and ethnical groups' own rights away from the global law paradigm, which is respected to be regulated these issues by these specific groups, the global law paradigm is one of a comprehensive global process of authoritative decision directed towards the realisation of goal values of human dignity. This vision is comprehensive in the sense that identifies individual human beings as the important actors in the social and sectoral law-making processes. In this way, wills of the peoples of the world clarify and implement their common interests with respect to all values. Therefore, a global class based system of democracy has a vital place for the global authority structure by identifying each individual as a legal subject of the global legal paradigm.

Last but not least, stressing how crucial legal topic it would be in the future, the concept of global law ensuring and treating individual human beings as 'subject' of the law should take this a step further through the discussions of the global law paradigm and global authority structure. These discussions take us to a point in which animals and plants should be considered as a 'subject' of the law in the global political economy. That human beings could not perceive or comprehend, as yet, how much animals and plants take part in our daily life does not mean their role and effectiveness do not exist. Particularly, when the interrelationship of global forces is shifted to global environmental forces leading the rest of global forces as a base through 'War of Movement' and 'War of Position', approving animals and plants as legal subject would be more feasible through the global law paradigm.



## **4.2 The Global Authority Structure**

The law institutionalises the worldwide shift in power from governmental actors to economic actors in line with development of legal globalisation contributing to autonomous sectors of the global society. Indeed, the LM demonstrates the dialectical relationship between coercion and consent in the very fabric of commercial practices where commercial arrangements are highly asymmetrical and uneven as a reflection of the underlying asymmetrical of power between labour and capital. Through principles of contract, property and corporate law, the LM rationalises and objectifies the free and consensual of exchange relationships and subordinates its coercive aspects. As examined in Capitalist historic bloc of chapter 4, the freedom and justice of the capitalist exchange relations is a formalistic move that obscures fundamentally the antagonistic nature of the social relations formed by capitalist productive relations. The outcome of the antagonistic relation of production has reflected where structural power lies in that relationship: which is “mode of production”. The nature and locus of authority has thus changed and shifted with changes in the mode of productions which the LM plays key roles where the nature and structure of the global authority has been formed within generations and enforcement of global commercial norms.

The conception of authority is important for any social science that looks at relations within society. Without seizing authority or power, it cannot be understood how relational conflicts among global sectors are resolved and how global actors’ agenda are set and changed. As Susan Strange emphasised that: “It is impossible to arrive at the end result, the ultimate goal of study and analysis of the global political economy without giving explicit or implicit answers to these fundamental questions about how power has been used to shape the political economy and the

way in which it distributes costs and benefits, risks and opportunities to social groups, enterprises and organisations within the system.”<sup>17</sup>

“The mode of production” in the global political economy is what creates wealth or power. The interaction between the “mode of production” and social groups involved in it influences outcomes and allocation of the authority. When methods of production change, there will likely follow a shift in the distribution of the power. Dynamics of the global society comprise the peculiar relationships between autonomous and organised spheres of the various social subsystems. Globalisation enables that many social sectors have the chance to free themselves from the restrictions that the existing world order imposes on them. In the relationship of global sectors such as media, health and education, globalisation process is not opening a chance not just to assert the autonomy of their activities but also establish the global authority structure. There accordingly arises a new role of institutionalising law in the various sectors. Therefore, the battle among the various sectors influences changes in the power that would restructure the class-based global authority constitution. In addition, in the existing system these sectoral activities are located either in private or public hierarchies. It is then clear that their intrinsic rationality and normativity cannot be fully developed either under political dominance or the profit of market.

Authority is an elusive and indispensable concept, linked to central issues of the social sciences as the authority has a preeminent role possessing the concept of legitimacy and legitimate power. According to Freidman, authority has two significant elements: publicness and social construction.<sup>18</sup> The notion of authority invokes a sense of publicness, which entails the

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<sup>17</sup> Christopher May, ‘Strange Fruit: Susan Strange Theory of Structural Power in the International Political Economy’ (1996) 10(2) *Global Society* < <http://www.tandfonline.com/doi/abs/10.1080/13600829608443105?journalCode=cgsj20> > accessed 3 November 2016.

<sup>18</sup> A C Cutler, ‘Locating “Authority” in the Global Political Economy’ (1999) 43(1) *ISQ* < <http://www.jstor.org/stable/pdfplus/2600965.pdf?acceptTC=true> > accessed 12 November 2014

surrender of the private authority. Avoiding unnecessary repetition regarding to the publicness of authority, dissolution of the distinction between the private and public sphere will ensure the publicness of authority for the restructure of the global authority structure. As for the social construction, authority derives its meaning from a normative arrangement among members of society. The existence of societal context for authority is regarded as an essential aspect of its character. As Friedman notes, “the concept of authority can thus have application only within the context of certain socially accepted criteria which serve to identify person(s) whose utterances are to count as authoritative”.<sup>19</sup> Gramscian notions of hegemony provide a useful way of capturing the nature of the relationship between consent and coercion in the construction authority as most theorists begin with the conviction that authority lies somewhere between coercion and persuasion. Through the globalisation of legal thinking, the unification movement forms an essential element for the reconfiguration of the global authority resulting from global productive relations. The global mode of production must be conceived as a totality for which global social forces operating in the global political economy are determinant. The hegemony is an order with a dominant mode of production, which the restructuring of global production and power appear to have begun to transform the basis of political authority, legitimacy and accountability away from the national towards the global levels.

As accepted mostly that democracy is the best method to govern a nation, it is hard to think why it should not be the best way to govern the world. Indeed, it is surely demonstrable that many of the most pressing global problems arise from an absence of global democracy. The driving power underlying the concept of the global democracy is the regulation of global issues. Even if all governments had an equal voice, global issues are featured by domestic elections through which national governments elected to tackle domestic issues. Without a separate

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<sup>19</sup> *ibid.*

mechanism for determining global responses to global issues, the global society's ability to affect the regulation of global issues is muted. This problem is commonly described as 'photocopy democracy'. Existing mechanisms for global issues from domestic elections to setting international policies become indirect, greyer and harder to decipher as governments still acts as a filter between the global society and global issues. Even, governments which have consulted their people may take counter stance as opposed to their people' will.

Global issues which most concern us - climate change, global income inequality, nuclear proliferation, water crisis and war can be addressed only globally. Without global measures and global institutions, it is impossible to regulate global issues. If we leave the regulation of global issues to internationalism, we would not have a critical voice on what would change our daily life pattern. As a result of global issues, the democratic global authority will enhance the sense that we are all in this together. It encourages us to treat a global problem affecting the earth and thrives on the appreciation of our global society. Thus, without global transformation, national transformations are impossible as Gramsci notes, crisis consist in precisely the fact that the old is dying and the new cannot be born.<sup>20</sup>

The power of globalisation harnesses the development of the global governance, overthrowing existing institutions to replace with the global authority structure as the power realm in the global political economy has been changing. The global society must be in charge of where the global forces should be concentrating to gain influence in connection with the global issues, considering direct involvement with the class based system of the global authority structure. The class based system of the global authority can function as an emancipatory project that exposes real dynamics of the global political economy and at the same time assists classes which is destined to play the emancipatory role for the human species. The global authority

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<sup>20</sup> Antonia Gramsci, *Selections from the Prison Notebooks* (Quentin Hoare and Geoffrey Nowell Smith ed and trs, ElecBook 1999).

would arise in a way of regulatory systems for global issues being regulated by a class-based global system, escaping the grip of international system. As the strong sense of the global society is improving in the global political economy, global people's assembly has a revolutionary potential required widespread sense of identity as a global citizenship. A democratically elected world parliament as the global authority ensures the participatory democracy, through which inequalities in the global political economy caused by global economic forces would be minimised, ensuring all individuals to have an equal voice and rights. According to the class-based global parliament, social unity or social reality derives from the consent of individuals as the 'subject' of the law. A democratically elected, class-based global parliament is the antidote against everything that has been globalised except our consent.

## **Chapter 7: Conclusion**

‘Opening the window on Lex Mercatoria: From Medieval Times to the Future’ re-imagines the medieval LM doctrine as a pragmatic response to the rapidly emerging global political economy in the twenty-first century. This thesis offers potential ways to identify the role and significance of the LM in the present global political economy, which reflects the crisis of the existing world order and transformations in an emerging world order. The historical dialectic between economics (private) and politics (public) has caused the existing world order to fail to respond to the needs and the realities of the global political economy. As global society has been affected by the juridification, pluralisation and privatisation of the global commercial norms in connection with the art of separation, the dissolution of the distinction between private and public sphere consolidates the role of the LM as part of the emerging world order.

In the emerging world order, the development of the philosophical conception of the global political economy is established in the necessity for individuals to take themselves out of the state centred system. The complex project of theorising the global political economy leads to the global society with all its forms, stakes, forces and actors establishing the global society’s dimensions as cells of global rationality. The increasing interaction and integration within the global political economy between nature and human beings from different backgrounds geographically, politically as well as socio-culturally has increased within the essence of global issues. In order to regulate global issues democratically and fairly, the necessity of the emerging global order is required by differences of nature and scope of global issues as opposed to that of local issues. The features of the global issues can be explained by differentiation within the global society. This thesis acknowledges the requirement of the existence of the emerging global order on the base of distinction between global issues and local issues.

The denationalization of the legal process of global issues has been observed within arbitration especially in the global trade, which is a shift of prominence in the primary principle of differentiation: a shift from territorial to functional differentiation on the global level. This is fundamental and crucial for the future direction of the global commercial law as the LM is produced at the periphery of the legal process of the global political economy. The obvious lesson of the historical evolution of the LM proves that it is impossible to imagine a world without global connections. They have always existed and no place has escaped their formative influence. Rendering the LM visible, accessible and workable in the global political economy captures self-reproducing legal discourse of global dimension at each industrial base in close interaction with globally operating industrial legal entities and transactions. Therefore, the LM breaks a classical taboo – a law cannot exist and cannot be applied beyond the realms of domestic states and international relations.

The global society being a platform for the regulation of global issues requires a new historic bloc by closing up the capitalist historic bloc in the configuration of the emerging world order. In the new historic bloc, the material, ideological and institutional foundations play a key role to respond to the needs and the realities of the global political economy by regulating global issues. The global society is a new era of interconnectedness of global social forces. This is the fundamental basis for understanding the global political economy that the emerging global order is founded upon a historically specific yet changing ensemble of social forces. Therefore, the new emerging global order is attributed to a range of globalising forces which are integrating the material, political, social and cultural life of so many individuals on the planet, but which are simultaneously disintegrating previously embedded forms of socio-economic and political organisation. The global society has a range of social forces and dynamics interacting with each other in complex and indefinite ways. The emerging global order should

be maintained by integrity and specificity of the global forces without emptying their social content and forming artificial discontinuities between them. The crucial point to determine here is how the mechanism of the interrelationship between the global forces functions. In order to determine it, the global issues have a vital role to find answers to these questions by establishing the emerging world order in the global political economy. There is a strong relationship between global issues and global forces in the global society with respect to how to regulate global issues and through which global forces because the interrelationship of the global forces determines the order of priority among global issues. The emerging world order would be established of undergoing hegemonic interrelationship among the global social forces, which is conceived as a totality as social reality.

The global trade is a model and outstanding global issue in the global society, considering global economic forces have become prominent and substantial in the global political economy. While global trade has been developing, the needs for a universal commercial law can no longer be denied in order to avoid complexities and diversities of national laws. The LM's precepts have appeared in the vibrant global commercial law, invoking for the renaissance of the LM with the relative decline of state and the rise of the global commerce. This thesis reveals the important roles of the global commercial law in light of current legal, political and economic realities as it regulates one of the most outstanding global legal issues, the global trade. This research has attempted to design a new and unifying theory of global legal order that is capable of explaining the role of the LM as the global commercial law in the global political economy. This thesis re-reads Marx with an altered perspective, laying out Marx's theoretical tools in readiness for the analysis of today's world. It is Marxism's goal to restore the sense to bring all members to a new understanding of their connectedness in the global society so it enables them to take control of their common life in the global political economy. The intention of



Marxism is to provide a theoretical foundation for interpreting the world, changing it to a liveable, fair, emancipated place. In Marxist social theory, the social reality is conceived as a totality integrated and primarily constituted by modes of production. Analysis of the changing mode of production influences aspects of everyday life especially in political and socio-cultural dimensions of the global civil society such as psychology, sexuality, political ideology, religion and literature. Accordingly, the relationship and structure of the global forces must be reconfigured by the global society. Gramsci's approach to the Marxist theory is adopted by this thesis to analyse and establish the interrelationship and interconnectedness of global forces for the regulation of global issues in relations to the Gramscian hegemony.

The Marxist approach is becoming prominent in the global political economy because it analyses hegemonic relationships between the global social forces in order for the regulation of global issues as global economic force is dominant among other global forces. Under the structure of the class based system in the global political economy, the interrelationship of global forces underlies establishing dynamics and changes between social classes, which forms a new global order. As Marxist principles are assumed outdated in the analysis of today's existing system, one of the aims that has been adopted in this thesis is to update the principles of Marxism with the realities of the global political economy because key principles of Marxism are still relevant to the global political economy. While dominant theories (realism and liberalism) put the state at the core of their doctrine, Marxism offers an alternative way to explain and ultimately to change the world order, which serves conveniently to regulate global issues. In order to find solutions for problems of the global political economy, the interrelationship and interconnectedness of the global forces is essential. What distinguishes the Marxist analysis so radically from classical political economy is that Marxist principles: "mode of production, surplus value and class conflicts" have a special relevance in the global

political economy with the global commercial law through the global economic force. The emerging world order in the global society is based upon the interrelationship of the global forces, which global economic forces have formed its superiority for now as a base over other global forces.

The Marxist theory is the key to the development of the global commercial law as the merchant community stresses the importance of the class system in the global political economy. In this dynamic, the most dramatic changes are taking place at the edge of the law. In globalisation dominant law-making is shifting from centres of the law which had been politically institutionalised in the nation state to the boundaries between the law and globalised social sectors with dynamics of the global political economy. The differentiation of global law into the emerging global order is the external reach of their jurisdiction along issue-specific rather than territorial lines, which is compatible with the regulation of global issues that this thesis has taken central argument. The global law paradigm is one of a comprehensive global process of authoritative decision directed towards the realisation of targeted values of human dignity. This vision is comprehensive in the sense that identifies individual human beings as the important actors in the social and sectoral law-making processes. In this way, the will of the peoples of the world clarify and implement their common interests with respect to all values. Therefore, a global class-based system of democracy has a vital place for the global authority structure by identifying each individual as a legal subject of the global legal paradigm. The global commercial law plays a vital role because identifying the future direction of global economic force is a prominent component to determine the emerging global order through which its authority structure should be established by the structure of global forces. Therefore, the LM is so foundational to the global political economy that the global commercial law may

be usefully regarded as both a constitutive element of the global legal paradigm and an attribute of the global order.

The formation of each historic bloc has historically attained their own social and authority structure that are shaped by social forces. It proves that the nature of authority has changed within generations and with the enforcement of global commercial norms. Therefore, locating and specifying the structure and the nature of authority in the global political economy is pivoted on LM. To anticipate the future status of the global commercial law in relation with the global law paradigm and global authority structure, is determinant and crucial for restructuring the global political economy.

The global society must be in charge of where the global forces should be concentrating to gain influence in connection with the global issues, considering direct involvement with the class based system of the global authority structure. The class based system of the global authority can function as an emancipatory project that exposes real dynamics of the global political economy and at the same time assists classes which is destined to play the emancipatory role for the human species. Democracy is still the best method to govern the global political economy under the Marxist class system, rendering each class to have their own voice of its rights and obligations. For this reason, a global class based system of democracy has a vital substance for individuals having the same or similar concerns and interests. The battle among the various sectors influences changes in the power that would restructure the class-based global authority constitution. Thus, the legal structure of the global political economy is vital in relation to the global authority structure: this explains why the LM has an important role in the global political economy. The global authority would arise in a way of regulatory systems for global issues being regulated by a class-based global system, escaping the grip of an international system. As a strong sense of global society is improving in the global political economy, the global people's assembly has a revolutionary potential. This is required for a

widespread sense of identity as a global citizenship. A democratically elected world parliament as the global authority ensures the participatory democracy, through which inequalities in the global political economy caused by global economic forces would be minimised, ensuring all individuals to have an equal voice and rights. According to the class-based global parliament, social unity or social reality derives from the consent of individuals as the ‘subject’ of the law. A democratically elected, class-based global parliament is the antidote against everything that has been globalised except our consent. As a conclusion, a democratic and class-based system of the global authority structure come together under the mechanism of global parliament, which the global commercial law plays crucial and indispensable role and significance.

# APPENDICES

## APPENDIX 1: Data on Filings with Arbitration Institutions<sup>1</sup>

	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
<b>AAA</b>	207	187	180	226	320	387	453	510	649	672	646
<b>BCICAC*</b>	52	54	40	57	41	49	60	88	88	75	76
<b>CIETAC</b>	486	829	902	778	723	645	609	543	731*	684*	709*
<b>HKIAC</b>	139	150	184	197	218	240	257	298	307	320	287
<b>ICC</b>	352	384	427	433	452	466	529	541	566*	593*	580*
<b>JCAA</b>	3	4	7	8	13	14	12	10	17	9	14
<b>KCAB</b>	28	33	18	36	51	59	40	40	65	47	38
<b>KUALA LUMPUR</b>	3	8	12	6	8	15	19	12	4	N/A	N/A
<b>LCIA*</b>	29	39	49	37	52	70	56	81	71	88	104
<b>SIAC</b>	15	22	37	25	43	67	67	55	56	46	41
<b>SCC</b>	78	74	70	75	82	92	104	73	74	55	82
<b>TOTAL</b>	<b>1392</b>	<b>1784</b>	<b>1926</b>	<b>1878</b>	<b>2003</b>	<b>2104</b>	<b>2206</b>	<b>2251</b>	<b>2628</b>	<b>2589</b>	<b>2577</b>

\*Includes both domestic and global arbitrations

**AAA:** American Arbitration Association/International Centre for Dispute Resolution

**BCICAC:** British Columbia International Commercial Arbitration Centre

**CIETAC:** China International Economic and Trade Arbitration Commission

**HKIAC:** Hong Kong International Arbitration Centre

**ICC:** International Chamber of Commerce

**JCAA:** Japan Commercial Arbitration Association

**KCAB:** Korean Commercial Arbitration Board

**Kuala Lumpur:** Kuala Lumpur Regional Centre for Arbitration

**LCIA:** London Court of International Arbitration

**SIAC:** Singapore International Arbitration Centre

**SCC:** Arbitration Institute of the Stockholm Chamber of Commerce

<sup>1</sup> Hong Kong International Arbitration Centre, "Statistics: International Arbitration Cases Received" (2004), citing Christopher R Drahozal and Richard W. Naimark (ed), *Towards a Science of International Arbitration* (Kluwer Law International 2005) 341.

## APPENDIX 2: Applicable Law in ICC Arbitration Clauses<sup>2</sup>

	2000	2001	2002	2003
National Law	75%	77%	79.4%	80.4
Other Rules	2%	1%	2.3%	1.2%
Applicable Law Not Specified	23%	22%	18.3%	18.3%

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<sup>2</sup> Christopher R Drahozal and Richard W. Naimark (ed), *Towards a Science of International Arbitration* (Kluwer Law International 2005), cited from ICC Int'l Ct Arb Bulletin '2003 Statistical Report'.

### APPENDIX 3: Arbitration Institutions' Rules on Trade Usages <sup>3</sup>

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#### Rules Requiring Arbitrator to Consider Trade Usages

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- |  |   |
|--|---|
| - American Arbitration Association                                       | - German Institution of Arbitration*                      |
| - Australian Centre for International Arbitration                        | - Hong Kong International Arbitration Centre*             |
| - British Columbia International Commercial Arbitration Centre *         | - Hungarian Chamber of Commerce                           |
| - Cairo Regional Centre for International Commercial Arbitration*        | - Indian Society of Arbitrators                           |
| - Chamber of Commerce, Industry of the Russian Federation*               | - Institute of Arbitrators and Mediators Australia*       |
| - Chamber of Commerce, Industry and Agriculture of Panama*               | - Inter-American Commercial Arbitration Commission*       |
| - Chicago International Dispute Resolution Association*                  | - International Chamber of Commerce (ICC)                 |
| - China International Economic and Trade Arbitration Commission (CIETAC) | - Italian Association for Arbitration                     |
| - Commercial Arbitration & Mediation Centre for the Americas             | - Kuala Lumpur Regional Centre for Arbitration*           |
| - CPR Institute for Dispute Resolution                                   | - Latvian Chamber of Commerce and Industry*               |
| - Croatian Chamber of Economy*   | - Milan Chamber of National and International Arbitration |
| - Economic and Agricultural Chambers of the Czech Republic               | - Ministry of Justice (Thailand), Arbitration Institute   |
|  | - Netherlands Arbitration Institute                       |
| - Estonian Chamber of Commerce and Industry                              | - Portuguese Chamber of Commerce & Industry               |
| - Federal Economic Chamber (Vienna)                                      | - Spanish Court of Arbitration*                           |
| - G.C.C. Commercial Arbitration Centre                                   | - Vietnam International Arbitration Center                |
| - World Intellectual Property Organization                               |   |

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#### Rules Silent on Trade Usages

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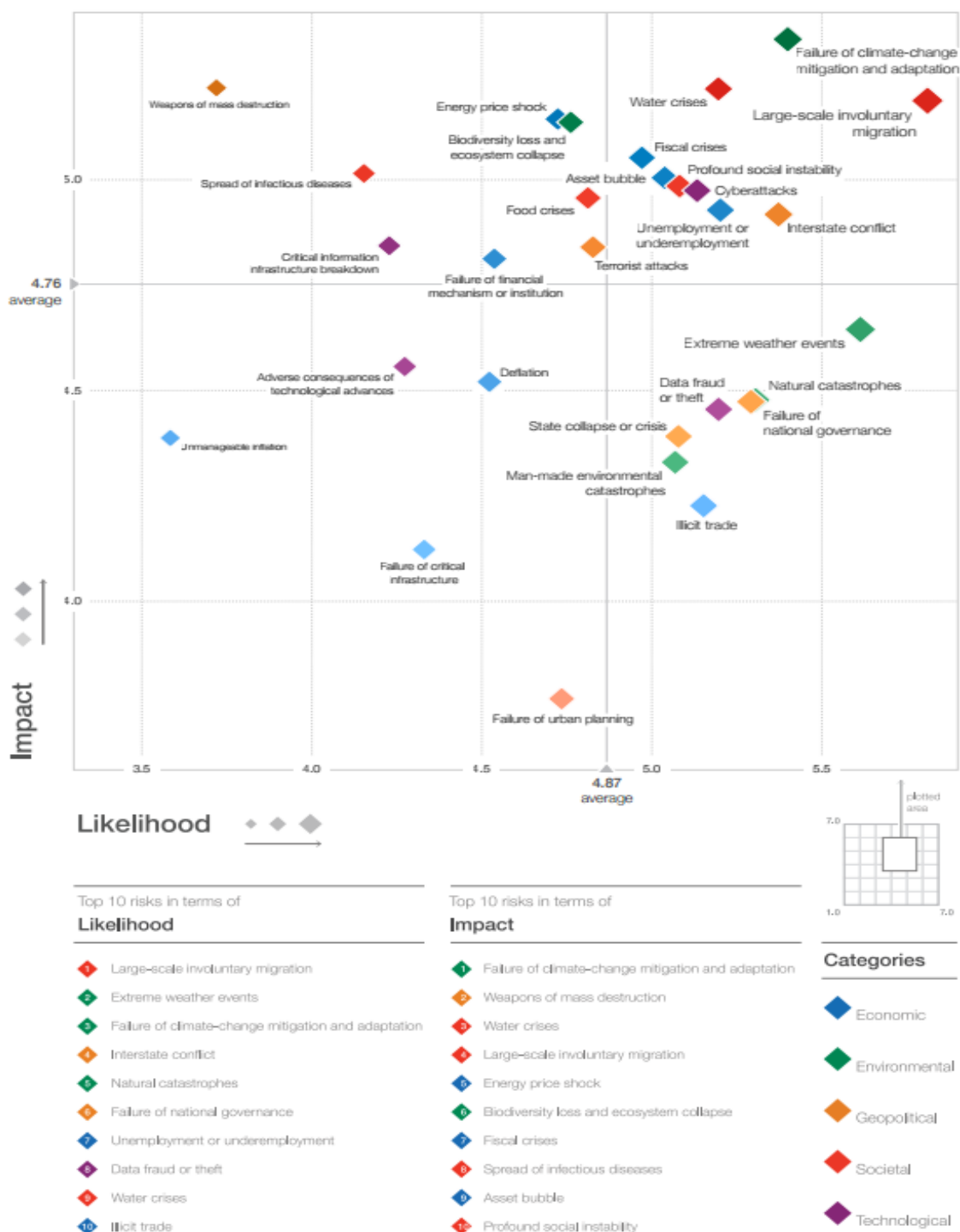
- |   |  |
|---|--|
| - Belgian Centre for Arbitration & Mediation (CEPANI) | - Japan Commercial Arbitration Association   |
| - Central Chamber of Commerce of Finland              | - Korean Commercial Arbitration Board        |
| - Chamber of Commerce and Industry of Geneva          | - London Court of International Arbitration  |
| - Danish Institute of Arbitration                     | - Singapore International Arbitration Centre |
| - Euro-Arab Chambers of Commerce                      | - Stockholm Chamber of Commerce              |
| - Institute of Arbitration (Belgium)                  | - Zurich Chamber of Commerce                 |
- 

\*Uses UNCITRAL Rule without modification

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<sup>3</sup> Christopher R Drahozal and Richard W. Naimark (ed), *Towards a Science of International Arbitration* (Kluwer Law International 2005) 235.

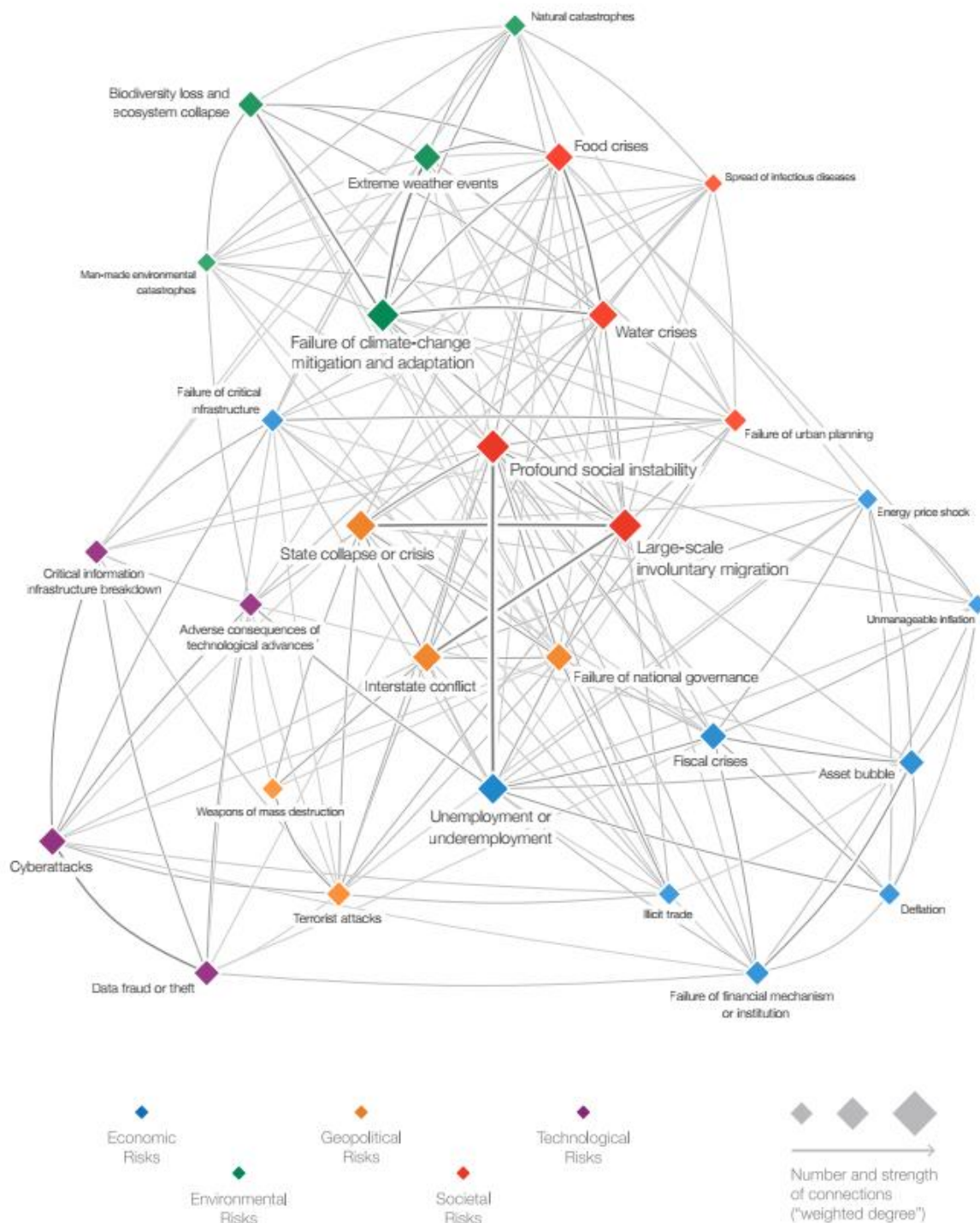
## APPENDIX 4: The Global Risks Landscape 2016<sup>4</sup>



<sup>4</sup> World Economic Forum, 'The Global Risks Report 2016' (2016) < [http://www3.weforum.org/docs/GRR/WEF\\_GRR16.pdf](http://www3.weforum.org/docs/GRR/WEF_GRR16.pdf) > accessed 30 September 2016.



## APPENDIX 5: The Global Risks Interconnections Map 2016<sup>5</sup>



<sup>5</sup> Global Risks Perception Survey 2015, citing World Economic Forum, 'The Global Risks Report 2016' (2016) < [http://www3.weforum.org/docs/GRR/WEF\\_GRR16.pdf](http://www3.weforum.org/docs/GRR/WEF_GRR16.pdf) > accessed 30 September 2016.

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